

No. 89-1493-CFX
Status: GRANTED

Title: Air Line Pilots Association International,
Petitioner
v.
Joseph E. O'Neill, et al.

Docketed:
March 23, 1990

Court: United States Court of Appeals
for the Fifth Circuit

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Entry	Date	Note	Proceedings and Orders
1	Mar 23 1990	G	Petition for writ of certiorari filed.
4	Apr 23 1990	X	Brief of respondents Joseph E. O'Neill, et al. in opposition filed.
2	Apr 25 1990		DISTRIBUTED. May 10, 1990
3	Apr 26 1990	X	Reply brief of petitioner Air Line Pilots Association International filed.
6	May 11 1990		REDISTRIBUTED. May 17, 1990
7	May 21 1990	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
9	Aug 14 1990	X	Brief amicus curiae of United States filed.
8	Aug 15 1990		REDISTRIBUTED. September 24, 1990
10	Oct 1 1990		Petition GRANTED. *****
12	Nov 9 1990		Order extending time to file brief of petitioner on the merits until November 16, 1990.
13	Nov 9 1990		Record filed.
		*	Certified copy of C. A. Proceedings received.
17	Nov 15 1990	G	Motion of Continental Airlines, Inc. for leave to file a brief as amicus curiae filed.
22	Nov 15 1990		* Appendix of Continental Airlines filed.
14	Nov 16 1990		Brief of petitioner Air Line Pilots Association International filed.
15	Nov 16 1990		Joint appendix filed.
16	Nov 16 1990		Brief amicus curiae of United States filed.
18	Nov 20 1990		Record filed.
		*	Certified copy of original record on appeal received. (2boxes).
20	Nov 23 1990		SET FOR ARGUMENT MONDAY, JANUARY 14, 1991. (1ST CASE)
23	Nov 28 1990		CIRCULATED.
25	Nov 30 1990	D	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
24	Dec 3 1990		Motion of Continental Airlines, Inc. for leave to file a brief as amicus curiae GRANTED.
26	Dec 10 1990		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
27	Dec 18 1990	X	Brief of respondents Joseph E. O'Neill, et al. filed.
28	Jan 8 1991	X	Reply brief of petitioners Joseph O'Neill, et al. filed.
29	Jan 14 1991		ARGUED.

89- 1498 (1)

No. 89-

Supreme Court, U.S.
F I L E D

MAR 23 1990

JOSEPH F. SAMPOL, JR.
CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Petitioner,

-against-

JOSEPH E. O'NEILL, et al.,

Respondents.

On Writ of Certiorari To The
United States Court of Appeals For The Fifth Circuit

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March 23, 1990

QUESTIONS PRESENTED

Whether in a breach of the duty of fair representation case challenging a union's conduct in negotiating an end to a strike (as opposed to administering a collective bargaining agreement), the Fifth Circuit was correct in applying the standard set forth in *Vaca v. Sipes*, 386 U.S. 171 (1967), in conflict with the Seventh, Ninth, and Eleventh Circuits which apply a standard derived from *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953)?

Whether in a breach of the duty of fair representation case challenging a union's decision to negotiate a strike settlement agreement rather than to make an unconditional offer to return to work, summary judgment for the union may be reversed in the absence of any evidence of bad faith or intentional misconduct by the union and when legal uncertainty existed as to the employees' rights under an unconditional offer to return?

Whether the Fifth Circuit's failure to consider the Supreme Court's decision in *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 109 S. Ct. 1225 (1989), and its reliance on the Eighth Circuit's decision in that case which this Court had reversed, requires summary vacatur and remand?

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In The
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Petitioner,

-against-

JOSEPH E. O'NEILL, *et al.*,

Respondents.

Petition for Writ of Certiorari To The
United States Court of Appeals For The Fifth Circuit

Petitioner respectfully requests that writ of *certiorari* be issued to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit, in *O'Neill, et al. v. Air Line Pilots Ass'n Intl.*, 5th Cir. No. 88-2848 (Oct. 31, 1989).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 886 F.2d 1438 (5th Cir. 1989). (Appendix 2.) Upon petitions for rehearing and rehearing en banc, the Court of Appeals issued an unreported order. (Appendix 2.) The District Court opinion was issued from the bench. (Appendix 3.)

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1989. Timely petitions for rehearing and rehearing en banc were denied on December 27, 1989. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Respondents' complaint alleges a breach of petitioner's duty of fair representation in violation of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, and applicable case law. (Relevant excerpts attached as Appendix 1.)

STATEMENT OF THE CASE

At the core of this case is the allegation of the plaintiff-respondent class (the "O'Neill Group") that petitioner Air Line Pilots Association International ("ALPA") ended the bitter and difficult two year strike at Continental Airlines ("Continental") on terms that constituted a breach of ALPA's duty of fair representation ("DFR") in violation of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA").

In 1983, ALPA was a party to a collective bargaining agreement with Continental. On September 24, 1983, Continental filed for Chapter 11 reorganization in the Bankruptcy Court of the Southern District of Texas, unilaterally abrogated its ALPA contract, and cut pilots' salaries and benefits to less than half the amounts provided by the contract. (R.131, Higgins Aff. ¶4.)¹ ALPA responded by striking

Continental on October 1, 1983. The strike lasted more than two years, during which the bankruptcy court, over ALPA's objection, approved Continental's rejection of its labor contracts. (App.2 at 2.)

ALPA was unable to significantly affect Continental's business. (R.131, Higgins Aff. ¶ 21.) The company had little trouble hiring pilot replacements; by August 1985, 1,600 permanent replacement pilots were working (including new hires, non-strikers, and strikers who abandoned the strike). (*Id.* at ¶ 6; App.2 at 2.) At that time, only 1,000 pilots still remained on strike. (*Id.*) In sum, the strike did not succeed in putting effective economic pressure on Continental to reach a negotiated agreement with ALPA.

Three critical actions undertaken by Continental in 1985 weakened ALPA's negotiating strength. First, on August 26, 1985, because the permanent replacements outnumbered striking pilots, Continental stated that it was withdrawing recognition of ALPA and was breaking off all negotiations with ALPA over proposed terms of a collective bargaining agreement. (R.131 Higgins Aff. ¶ 6.)

Second, in September 1985, Continental announced its intention to fill all of its pilot vacancies by posting "Supplementary Base Vacancy Bid 1985-5" (the "85-5 bid") for 441 captain and first officer vacancies and an undetermined number of second officer vacancies. (*Id.* ¶ 7.)² The number of

Bankruptcy Court.

2. A "vacancy bid" in the airline industry is a long-term pilot training and staffing plan, which projects and fills pilot staffing needs by base (*i.e.* geographic location), equipment (*i.e.* aircraft type), and position (*i.e.* captain, first officer, second officer). The projections are based on scheduled aircraft deliveries (or sales, leases, etc.), expected retirements or attrition, and marketing plans for future flight schedules. Once a system-wide vacancy bid is announced, each Continental pilot is allowed to "bid" his or her preference for base, equipment, and status, and the bids are awarded in seniority order. The bid award assigns each pilot to a specific base, equipment, and position. A training schedule is devised to ensure that each pilot who requires training will

1. Throughout this brief, the following abbreviations will be used: "R." refers to the record in the District Court. "App." refers to the Appendix annexed to this Petition. "App. 1" contains relevant excerpts of the Railway Labor Act. "App. 2" contains the Fifth Circuit's October 31, 1989 opinion and the December 27, 1989 order denying rehearing; "App. 3" contains the District Court's transcribed decision granting summary judgment on November 30, 1987; and "App. 4" contains the October 31, 1985 order and award of the

vacancies posted for captain positions (218) was the largest in Continental history and, if implemented, would have effectively eliminated the possibility that more than a handful of captain vacancies would become available over the next several years. (*Id.* ¶¶ 7-8.) Accordingly, several hundred striking pilots attempted to protect their post-strike job prospects by submitting bids. (App.2 at 3-4; deposition of D. Kirby Schnell at 436, 499.)

Finally, on September 25, 1985, one week after the 85-5 bid closed, Continental filed a claim in federal court against ALPA seeking to void all offers tendered by strikers in the 85-5 bid as fraudulent and designed to interfere with Continental's business, and stating that strikers were not entitled to any of the 85-5 bid vacancies under any circumstances. (R.163, Att. 9.) After the bid closed, Continental announced that all the posted bid vacancies had been filled with working permanent replacement pilots. (R. 131, Higgins Aff. ¶ 8.)

The Continental Master Executive Council ("MEC") (the organizational sub-division of ALPA elected to function as the governing council for ALPA members employed by Continental) (R.131, Higgins Aff. ¶¶ 2-3), met in late September, 1985 to consider the only two viable options remaining: making an unconditional offer to return to work or pursuing a negotiated end to the strike.

The MEC first rejected a motion to make an unconditional offer to return — largely at the urging and with the votes of MEC members who are named representatives of the plaintiff group. (Deposition of Plaintiff Robert Therrien ("Therrien dep.") at 96-104.) In rejecting an unconditional return, the MEC made a judgment that, since Continental had already filled all of the posted 85-5 bid vacancies with permanent replacements, ALPA's best hope for obtaining access for

be trained in position on a schedule designed to avoid any shortage of qualified pilots and any disruptions to service. (R.163, Att. 9; Exh. 25 to deposition of Dennis Higgins.)

striking pilots to those positions (and any other pilot positions at Continental in seniority order) was through negotiation. (R.131, Higgins Aff. ¶ 8; Therrien dep. at 103.) The MEC then authorized the MEC officers and negotiating committee chairman to negotiate a conclusion to the strike. (R.131, Higgins Aff. ¶16, Exh. J.) At the MEC's request, the bankruptcy court convened an intensive round of negotiations over a back-to-work agreement. (*Id.* ¶ 8.)

By the end of October, 1985, ALPA and Continental had negotiated, under the bankruptcy court's auspices, significant aspects of a back-to-work arrangement but had failed to reach a complete agreement to end the strike. (*Id.* ¶ 9.) Bankruptcy Judge Roberts reviewed the negotiated terms of the back-to-work agreement, resolved the remaining open terms at the request of the parties, and on October 31, 1985, issued an order and award of the bankruptcy court covering all aspects of the return to work of ALPA pilots. (*Id.*; App.4; deposition of Donald Henderson, Exhs. 53, 54.)

The order and award was described by the bankruptcy court as "a global [settlement which] encompasses a myriad of individual situations and circumstances." (Order of December 27, 1985, R.163, Att. 2.8 at 6.) Continental and ALPA each agreed to withdraw all pending litigation between them. (App.4 at 23.) The back-to-work provisions provided that pilots who agreed to waive certain individual strike litigation claims against Continental had the right to choose recall and reinstatement in seniority order ("Option 1") or voluntary severance with payment of \$4,000 per year of service ("Option 2"). (*Id.* at 5, 15-16.) Pilots who chose to preserve all their litigation rights against Continental were offered "Option 3": recall after the Option 1 pilots had been reinstated. (*Id.* at 5, 22.) The order and award did not enhance ALPA's position as a collective bargaining representative; it provided that it did not "constitute express or implied recognition of ALPA by Continental." (*Id.* at 23.)

Significantly, although Continental had already awarded all of the posted 85-5 bid positions to permanent replacements,

the order and award unwound those job assignments and granted nearly half the captain positions to returning strikers. Permanent replacements were to receive the first 100 captain positions allotted in the 85-5 bid, returning strikers the next 70 and, thereafter, returning strikers and replacement pilots were to be awarded captain vacancies on a 1:1 ratio. (*Id.* at 7-8.)³ The remaining striking pilots were recalled to all available first and second officer positions and upon recall were allowed to bid in these positions purely on seniority basis.

In short, the order and award achieved numerous substantial benefits with a certainty that could not have been achieved through an unconditional return. The order and award:

(a) obtained the guaranteed right for strikers to fill, in seniority order, nearly half of the captain positions which Continental had already filled with non-strikers through the 85-5 bid (*id.* at 6-7);

(b) created a guaranteed schedule by which a substantial number of returning strikers had to be promoted to captain or receive captain's pay until vacancies consistent with that schedule arose (*id.* at 7-8);

(c) obtained the continuing jurisdiction and enforcement power of the bankruptcy court to ensure that Continental would fulfill its obligations (*id.* at 24-25);

3. Splitting captain positions pursuant to this formula was necessary during the post-strike transition period to facilitate an orderly integration of striking pilots back into the work force. Critically, however, other than the company's right to assign the base and equipment of a pilot's initial captain position and to require up to six months' experience as a first officer before serving as a captain, the order and award placed no other restrictions on the pilots' exercise of seniority rights once the pilot was recalled to work. Another provision of the order and award permitted Continental to assign the base and equipment of a returning striker in his/her initial post-strike position. (App.4 at 6.) This provision merely memorialized a right that Continental would have had even under an unconditional offer to return.

(d) obtained the right of early severance, with a payment of \$4,000 for each year of employment (\$2,000 for pilots furloughed before the strike), for pilots who were not employed by another air carrier and who did not wish to return to work for Continental after the two year absence occasioned by the strike (*id.* at 15-16); and

(e) guaranteed the right of all Option 1 pilots to be recalled in seniority order as future vacancies arose regardless of whether a pilot had found comparable work with another commercial airline and without any fear or threat of litigation (*id.* at 5).

Nearly six months after entry of the order and award, a group of pilots commenced this class action on behalf of all pilots who joined the strike and were not working for Continental at the end of the strike, claiming breach of the duty of fair representation, violation of statutory rights to vote, and two other claims not relevant here. The defendants were ALPA, the MEC, and five individual union officials.

The district court dismissed the entire complaint on summary judgment because the record evidence showed only that the plaintiffs were not satisfied with the results their union officials obtained in good faith in the face of "what was indisputably a hostile intransigent employer." (App.3 at 4.) That court found that there was nothing in the record to support an allegation that ALPA acted discriminatorily, arbitrarily, or in bad faith. Specifically, the district court found (App.3 at 3, 5):

There is nothing to indicate that the Union made any choices among the Union members or the strikers who were not Union members other than on the best deal that the Union thought it could construct; that the deal is somewhat less than not particularly satisfactory is not relevant to the issue of fair representation.

* * *

I don't think that the behavior of the Union has been shown to have any segment of [depravity] to it except in the pilots' view that they ultimately end up cooperating with Continental Airlines.

From that fact alone and from the fact that they used every tactic available to them to insure that their resolution of the dispute would not be upset cannot be translated into personal animosity or illegal motives against these pilots.

Therefore, the district court dismissed the DFR claim.⁴

The district court also ruled that plaintiffs had no right to vote on the order and award, either under ALPA's governing documents (App.3 at 4) or under Section 101(a)(1) of the Labor Management Reporting and Disclosure Act (29 U.S.C. § 411(a)(1)). (App.3 at 3.)

Plaintiffs appealed to the Fifth Circuit Court of Appeals only as to defendant ALPA, and only in respect of their DFR and LMRDA § 101 causes of action. On October 31, 1989, the Fifth Circuit affirmed the district court's decision dismissing the LMRDA § 101 claim, but vacated as to the DFR claim.

The Fifth Circuit held that the plaintiffs could assert two legal theories at trial. First, that court held that ALPA may have breached its duty of fair representation through "irrational or arbitrary" conduct "if the union inexplicably agreed to a settlement that left its members in a substantially worse position than if no settlement had been made" and the pilots had unconditionally abandoned the strike. (App.2 at 11.) In this

4. With respect to the DFR count, the district court also found that the order and award was more than a private agreement between the union and Continental; it was a court order and "[u]nder the circumstances of the existing bankruptcy law, since there was little Continental could do without the approval of the Court, the approval of the Court in this instance, however minor, . . . was essential." (App.3 at 2.)

regard, the Fifth Circuit held, as a matter of law, that if ALPA had abandoned the strike and made an unconditional offer to return, the Railway Labor Act would have entitled full-term striking pilots to displace permanent replacements from the positions awarded under the 85-5 bid. (App.2 at 14.) (ALPA, as we have noted, had negotiated to obtain, under the order and award, the right for strikers to occupy nearly half of the 85-5 bid captain positions.)

In concluding that full-term strikers were entitled to displace Continental's permanent replacement pilots from the 85-5 bid positions awarded during the strike, the Fifth Circuit relied on the Eighth Circuit's opinion in *Independent Federation of Flight Attendants v. Trans World Airlines, Inc.*, 819 F.2d 839 (8th Cir. 1987), *rev'd*, 109 S. Ct. 1225, 1230-33 (1989) (App.2 at 14), but did not cite or discuss this Court's subsequent reversal of the Eighth Circuit. The Fifth Circuit likewise relied on *ALPA v. United Air Lines, Inc.*, 614 F. Supp. 1020 (N.D. Ill. 1985), *aff'd in part and rev'd in part*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987), which did not involve positions awarded to working pilots during a strike and did not establish any general entitlement under the RLA to displace permanent replacements from such positions.

Second, the Fifth Circuit held that a factfinder could conclude that ALPA breached its duty of fair representation because the order and award may have impermissibly "discriminated" against full term strikers by permitting permanent replacement pilots to retain some of the 85-5 bid positions they were awarded during the strike. (App. 2 at 14-15.) This result, the Fifth Circuit asserted, was at odds with the RLA because it created a "cleavage" between full-term strikers and permanent replacements after the strike. (*Id.* at 15) (discussing *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).) Again, however, the Fifth Circuit ignored this Court's controlling opinion in *TWA v. IFFA* (which limited *Erie Resistor* and held that post-strike employer conduct favoring replacements, virtually identical to that used by Continental

here, does not constitute impermissible discrimination under the RLA).⁵

In its Petition for Rehearing and Suggestion for Rehearing En Banc, ALPA argued that the panel erred in refusing to follow this Court's controlling decisions in *TWA v. IFFA* and *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).⁶ The Petition for Rehearing and Suggestion for Rehearing En Banc were denied in an order dated December 27, 1989. (App.2 at 20.)

5. The Fifth Circuit also rejected ALPA's position that the order and award's approval by the bankruptcy court created a presumption of fairness, adequacy, and reasonableness. (App.2 at 11); see *United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981).

6. The Fifth Circuit made several incorrect factual statements in its decision as to which there can be no dispute, all of which were brought to that court's attention in petitioner's motion for rehearing. (See App. 2 at 4-6.) First, no pilot, no matter what option he chose, was required to waive any claims for unpaid pre-petition wages. (App.4 at 21.) Second, the order and award expressly provided that the seniority list would not be "dovetailed" at the end of the strike and that all striking pilots would retain their prestrike seniority after being recalled by Continental into their initial assignment. (App. 4 at 9, 15.) The 1:1 provision (alternating between striking and working pilots) only related to initial captain positions and was a temporary transition method. Third, while returning strikers had to accept their first assignment from Continental, that is exactly the same right which Continental would have had to assign all returning pilots to available vacancies upon an unconditional return. Fourth, the order and award provides that there will be no equipment freeze for pilots who are in positions assigned to them by Continental at the time a new vacancy becomes available for bidding. (App.4 at 6.) None of these factual errors, however, is material under Rule 56, Fed. R. Civ. P.

REASONS FOR GRANTING THE WRIT

Introduction

This case presents three questions, each of which independently calls for this Court's consideration.

First, whether the more exacting standard of fair representation stated in *Vaca v. Sipes*, 386 U.S. 161 (1967) — a case involving the rather straightforward task of *administering* an agreement — governs *all* duty of fair representation cases or whether the less confining standard stated in *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) — a case involving the polycentric task of *negotiating* an agreement — continues to cover negotiation situations.

The decision below rests on the premise that the *Vaca* standard governs all fair representation cases. Three other circuits read this Court's precedents the other way and have concluded that the *Vaca* standard governs contract administration cases and the *Huffman* standard governs contract negotiation cases. See *Burkevich v. ALPA*, 894 F.2d 346, 349 (9th Cir. 1990); *Thomas v. United Parcel Service*, 890 F.2d 909, 916-19 (7th Cir., 1989); and *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519-20 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 2066 (1989).

It is difficult to conceive of a more critical DFR issue than the content of the basic governing standard, or an issue on which conflict and confusion in the lower courts could be more detrimental to the sound development of this critical area of labor law. As we develop in Part I, *infra*, the Seventh Circuit's thoughtful opinion in *Thomas* makes a powerful showing for the proposition that it is *Huffman* not *Vaca* that governs here.

Second, assuming that the *Vaca* standard applies and a union's performance in negotiations is judged according to an "arbitrariness" or "discrimination" standard, is a union's negotiation decision which rests on an unsettled question of

substantive labor law, or which differentiates between unit members, entitled to judicial deference so long as it is the product of an honest, good faith, and considered judgment or is it subject to *de novo* judicial review as to the correctness of the union's understanding of the law.

The circuit court's ruling that the plaintiffs here have a viable claim for breach of the DFR rests squarely on that court's assumption that Continental's action in filling the 85-5 bid positions exclusively with permanent replacements was *unlawful*, that the striking pilots would have been entitled to displace the successful bidders, and that ALPA was wrong in its determination that the airline's actions might well pass legal muster or would require years of litigation to overturn.

It is of the essence in this regard that the court of appeals analyzed the legal status of the 85-5 bid as if this case were one brought against Continental for violating the Railway Labor Act and thus a case requiring a decision on the merits as to the legality of the bid plan; there is not a word in the opinion below taking account of the unsettled nature of the law at the time or so much as hinting that the union's concerns in this regard are entitled to any deference in this DFR case. In other words, the Fifth Circuit did not accord ALPA any range of reasonableness in making legal judgments — much less the "wide range" called for by *Huffman*, 345 U.S. at 338. Instead, that court second-guessed the union using 20-20 hindsight.

The Fifth Circuit's approach could not be more wrong or more harmful to national labor policy. If that court were right on how such disputed substantive labor law questions are to be resolved in DFR cases, no union could ever settle a labor dispute with any sense of safety. Under such a regime, the already difficult and sensitive task of negotiating agreements in situations in which the employer has demonstrated superior economic power would become all but impossible. That would undermine the policy favoring honest, good faith efforts to consummate such agreements as a means of furthering industrial peace.

Third, whether the Fifth Circuit committed such serious legal error in the following regard to call for the exercise of this Court's supervisory powers: the court below, in ruling on the critical 85-5 bid issue just outlined, ignored this Court's decision in *TWA v. IFFA*, 109 S. Ct. 1225 (Feb. 28, 1989) — despite the fact that *TWA* arose in a closely related context and dealt with nearly identical seniority issues — and relied instead on the Eighth Circuit decision this Court reversed in *TWA* and on *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), a decision the *TWA* Court found inapposite.

For the reasons already stated, we submit that in a duty of fair representation case, it is unduly harsh to subject a union negotiating decision which involves an unsettled legal issue to *de novo* judicial review on the correctness of the union's understanding of the law. However that may be, it is nothing less than unconscionable to hold that such a union judgment may be so wrong as to be arbitrary or discriminatory even though this Court's most recent decision in an analogous case indicates that the union's understanding of the law was clearly defensible and most probably correct.

The Fifth Circuit rendered just such an unconscionable decision here. The court below refused to do so much as notice *TWA* even though this Court's decision was issued just eight months prior to the issuance of the decision below and even though petitioner ALPA squarely relied on *TWA* in its petition for rehearing which was denied without opinion.

In these circumstances, should the Court conclude that, contrary to our submission, the first two questions presented here do not warrant plenary consideration, we submit that it is necessary to assuring the proper and uniform administration of the federal courts for this Court to grant this *certiorari* petition, summarily vacate the decision below, and remand this case to the Fifth Circuit for reconsideration in light of *TWA v. IFFA*.

I.

**There Is A Circuit Conflict On The Legal Standard
For Judging Whether A Union Has Provided Fair
Representation In Negotiating An Agreement**

A. As this Court held in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969), "[t]he heart of the Railway Labor Act is the duty, imposed by §2 First upon management and labor...to settle all disputes...in order to avoid any interruption to commerce." Unions, as the employees' exclusive representatives, are vested with the statutory authority to bargain collectively toward that end. RLA §2 Third and Fourth, 45 U.S.C. § 152 Third and Fourth. But as this Court has made clear, the union's

authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals.

* * *

Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Ford Motor Co. v. Huffman, 345 U.S. 330, 337-38 (1953).

Although this case involved just the sort of delicate negotiating responsibilities accorded deference in *Ford Motor v. Huffman*, the court below proceeded on the premise that there is a single standard for measuring a union's representational activities derived from *Vaca v. Sipes*, 386 U.S. 171 (1967):

The duty of fair representation owed by a union to its members has been implied by the courts from national labor statutes. The Supreme Court has stated that the duty of fair representation imposes on the exclusive bargaining representative "a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). More succinctly, "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190. [App. 2 at 9.]

The panel rejected the principle set forth in *Ford Motor v. Huffman* that a showing of "bad faith" or "hostile discrimination" needed to be made by plaintiffs. (App.2 at 9-10.) Indeed, the court below applied an exceptionally searching standard for reviewing the union's decisions here, derived from its earlier decision in *Tedford v. Peabody Coal Co.*, 533 F.2d 952 (5th Cir. 1976). (App. 2 at 10.)

The Fifth Circuit's error in this regard was cogently explained by the Seventh Circuit in *Thomas v. United Parcel Service, Inc.*, 890 F.2d at 916-17. *Thomas* points out that

As the Eleventh Circuit has recently recognized, "[t]he nature of the duty of fair representation which a Union owes its members is determined by considering the context in which the duty is asserted." *Parker v.*

Connors Steel Co., 855 F.2d 1510, 1519 (11th Cir. 1988), *cert. denied*, ____ U.S. ____, 109 S.Ct. 2066, 104 L.Ed.2d 631 (1989). As such, a number of distinctions must be made in order to achieve the flexibility necessary to realize justice in this area of the law.

We begin by noting that the courts have ordinarily, almost reflexively, deferred to union judgments, regardless of the circumstances. Our deferential stance is premised upon the belief that unions must be permitted to exercise a fair degree of discretion in making the policy choices necessary to secure the good of their members.... The union does not, however, exercise the same degree of discretion in each of its functions....

In any group of even moderate size and diversity, there are bound to be competing claims of entitlement, as well as conflicting opinions as to how best to achieve the common good of the group.... Our refusal to closely scrutinize the choices made by unions in the negotiation context is an acknowledgement of the complexity of the task presented, the range of more or less reasonable options available, and the authority of unions to act as autonomous agents on behalf of their members.

These reasons carry their greatest force when the union is negotiating a collective bargaining agreement on behalf of its members. It is at that time that our rule of deference is most compelling, for it is during the negotiation of a collective bargaining agreement that the union is required to safeguard and promote the good of its members *in the aggregate*.

The Seventh Circuit then drew the following contrast (890 F.2d at 917-18):

Once the union is called upon to *administer* a collective bargaining agreement, it assumes a more ministerial role and is therefore entitled to less deference than it enjoyed in the negotiation of the agreement. Once an agreement

has been reached, the critical value and policy choices have been made and the range of alternatives narrowed accordingly. It is less intrusive, and less an affront to union dignity, for a court to examine whether the union has complied with an agreement *it entered voluntarily* than for that same court to assess the wisdom of the agreement itself.

In the lead case of *Schultz v. Owens-Illinois, Inc.*, 696 F.2d 505 (7th Cir. 1982), this Court declared that "[d]uty of fair representation cases may take two forms:" those claiming a breach in the negotiation of a collective bargaining agreement and those alleging a breach in the administration of such an agreement. *Id.* at 514. The *Schultz* Court correctly viewed *Ford Motor Co.*, 345 U.S. at 330, 73 S.Ct. at 681, as articulating the standard in the negotiation context, with the union afforded a "wide range of reasonableness ... in serving the unit it represents...." *Id.* at 338, 73 S.Ct. at 686.... In the administration of a collective bargaining agreement, *Vaca v. Sipes*, 386 U.S. at 171, 87 S.Ct. at 903, sets the standard, and, in this context:

"[T]he Court did not ... focus on the inherent difficulties of satisfying the demands of diverse employees as it had in [*Ford Motor Co.*]. Instead, the Court emphasized the union's statutory obligation to represent each individual employee fairly, with a nonperfunctory concern for his complaints and with a nonarbitrary exercise of judgment in evaluating grievances. The application of the *Vaca* standard in the context of grievance procedures does not provide for union discretion within 'a wide range of reasonableness' — in contrast to the collective bargaining standard of [*Ford Motor Co.*]." *Schultz*, 696 F.2d at 515.⁷

7. So that we are not misunderstood, we note that in *Thomas* the Seventh Circuit went on to caution that the "distinction we have made between the

In sum, as *Thomas* makes clear, this negotiation case would have been judged under a different and more deferential standard in the Seventh Circuit than in the Fifth Circuit. A similar deferential standard would also be applied in both the Ninth and Eleventh Circuits. *Burkevich v. ALPA*, 894 F.2d 346, 349 (9th Cir. 1990); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519-20 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 2066 (1989). Moreover, *Thomas*' reasoning set out above demonstrates that it is the Seventh Circuit view — not the Fifth Circuit view — that is faithful to this Court's decisions. *Ford Motor Co. v. Huffman*, 345 U.S. at 337-38.⁸

negotiatory and administrative stages of the collective bargaining process does not mean that the courts will undertake a *de novo* review of union decisions in the administration of collective bargaining agreements, but only that less deference will be accorded unions serving in that capacity than in the negotiation of such agreements." 890 F.2d at 918-919.

8. The discussion in text only hints at the disarray existing in the lower courts as to the applicable standards in DFR cases, demonstrating the need for plenary review by this Court. For example, in *Thomas v. United Parcel*, 890 F.2d at 917, the Seventh Circuit speaks of a "refusal to closely scrutinize the choices made by unions in the negotiation context" but does not state when it will intervene. The Eleventh Circuit in *Parker v. Connors Steel*, 855 F.2d at 1520, prohibits arbitrary, irrational, or bad faith conduct in negotiation cases and arbitrary, discriminatory, or bad faith conduct in administration cases. In contrast, the Ninth Circuit in *Burkevich v. ALPA*, 894 F.2d at 349, holds that a union must fulfill its procedural functions in a manner which is not arbitrary, discriminatory, or in bad faith but if its conduct involves an exercise of judgment it is limited only by an absence of bad faith or discrimination.

As we have noted, the Fifth Circuit does not distinguish at all between the union's different functions, consistent with the approach taken in the Second, Third, Eighth, Tenth, and D.C. Circuits. See *Morgan v. St. Joseph R. Co.*, 815 F.2d 1232, 1234 (8th Cir.), *cert. denied*, 484 U.S. 846 (1987); *Eatz v. DME Unit of Local Union Number 3*, 794 F.2d 29, 34 (2d Cir. 1986); *Masy v. New Jersey Rail Operations, Inc.*, 790 F.2d 322, 327-28 (3d Cir.), *cert. denied*, 479 U.S. 916 (1986); *American Postal Workers Union Local 6885 v. American Postal Workers Union*, 665 F.2d 1096, 1105-07 (D.C. Cir. 1981); *Eason v. Frontier Air Lines, Inc.*, 636 F.2d 293, 295 (10th Cir. 1981).

Finally, the First, Fourth, and Sixth Circuits appear to recognize a difference between negotiation and administration functions, but have not articulated the clear distinction defined in the Seventh, Ninth, and Eleventh Circuit

B. By applying the standard set forth in *Vaca v. Sipes* to cases involving union negotiations and judgment, the panel invited the trier of fact to determine whether ALPA "arbitrarily" agreed to a back-to-work agreement that was unfavorable or "discriminatory." That is precisely the open-ended inquiry foreclosed by *Ford Motor v. Huffman* and its progeny. The rule of *Ford Motor v. Huffman* subjects the union's exercise of its negotiating judgment to review by a trier of fact *only* to the extent the "arbitrary" or "discriminatory" conduct at issue fails to meet the standard of "complete good faith and honesty of purpose." 345 U.S. at 337-38. The panel, nevertheless, expressly rejected the argument that intentional misconduct or bad faith needed to be shown by the plaintiffs. (App. 2 at 10.) This was inconsistent with *Ford Motor v. Huffman*. See also *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 301 (1971) (requiring "substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives"; "deliberate and severely hostile and irrational treatment"), and *Breininger v. Sheet Metal Workers*, 110 S. Ct. 424, 431-32 (1989) (DFR cases "require great sensitivity to tradeoffs between the interests of the bargaining unit as a whole and the rights of individuals," while protecting against "invidious, hostile treatment" (quoting *Lockridge*)).⁹

cases. See *Dement v. Richmond, Fredericksburg & Potomac R. Co.*, 845 F.2d 451, 457-60 (4th Cir. 1988); *Ratkosky v. United Transp. Union*, 843 F.2d 869, 876-78 (6th Cir. 1988); *Smith v. Local 7898, United Steelworkers*, 834 F.2d 93, 96-97 (4th Cir. 1987); *Berrigan v. Greyhound Lines, Inc.*, 782 F.2d 295, 297-99 (1st Cir. 1986); *Ruzicka v. General Motors*, 523 F.2d 306, 309-10 (6th Cir. 1975).

9. In fact, even *Vaca v. Sipes* implicitly recognized that two different standards must exist when the Court referred separately to the duty owed by a union "in its collective bargaining," citing *Ford Motor v. Huffman*, and "in its enforcement of the resulting collective bargaining agreement," citing *Humphrey v. Moore*. *Vaca v. Sipes*, 386 U.S. at 177. Cf. *Communication Workers of America v. Beck*, 108 S. Ct. 2641, 2647 (1988). *Vaca* then addressed itself exclusively to the enforcement and administration context when it limited the union's discretion with an "arbitrary, discriminatory, or in bad faith" standard. *Vaca*, 386 U.S. at 190. In no way did *Vaca* change this Court's earlier statement of the standard in negotiation cases which requires

The panel found that the order and award might be found to be "discriminatory" and a DFR breach under *Vaca v. Sipes* simply because it permitted Continental to treat permanent replacements differently from former strikers. However, unless the different treatment was the result of hostility to some union members, *Ford Motor v. Huffman*, *supra*, or is inherently unlawful such as race discrimination, *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944), such differences do not amount to discrimination violative of the union's duty of fair representation, at least in the context of the union's function as negotiator. *Parker v. Connors Steel*, 855 F.2d at 1519-21; *Schultz v. Owens-Illinois*, 696 F.2d 505, 514-15 (7th Cir. 1982). See also *TWA v. IFFA*, 109 S. Ct. 1225, 1232 (1989) ("inevitable effect" of strike that "differences will be exacerbated and that poststrike resentments may be created").¹⁰

the union to act with "complete good faith and honesty of purpose," and "without hostility." *Ford Motor v. Huffman*, 345 U.S. at 337-38.

10. Aside from the terms of the order and award itself, the only issues which the Fifth Circuit identified as possible fair representation claims related to whether ratification by the MEC was required and to alleged oral promises of a right of ratification by the membership-at-large. As to a claimed right of MEC ratification, the Fifth Circuit "accept[ed] for these purposes the pilots' interpretation of union policy," (App.2 at 18 n.4), thereby ignoring (but not reversing) the district court's conclusion that the governing union documents did not require ratification by the MEC and that a "plenary binding general agency" had been properly vested in the MEC officers and Negotiating Committee Chairman to do exactly what they did. (App.3 at 4.) In so doing, the Fifth Circuit improperly ignored the explicit and unambiguous union policy authorizing a strike settlement without ratification of any kind. *Newell v. Int'l Bhd. of Elec. Workers*, 789 F.2d 1186, 1189 (5th Cir. 1986) (union's interpretation of its own constitution and policy guidelines must be accepted by the court unless "patently unreasonable"). As to the plaintiffs' claim that some individuals were "orally assured" of membership ratification (App.2 at 18), that allegation was contained only in Count IV of the Amended Complaint, the dismissal of which was not appealed to the court of appeals. (Amended Complaint ¶55.) Moreover, plaintiffs failed to submit even one affidavit containing admissible evidence which the Fifth Circuit could have credited in deciding that a genuine issue of material fact might exist as to whether any such "assurances" were given.

The Fifth Circuit's failure to recognize the need for greater deference in the negotiation context conflicts directly with the reasoning of the Seventh, Ninth, and Eleventh Circuits in *Thomas*, *Burkevich*, and *Parker*, respectively. Since there was no evidence of bad faith or purpose there can be no question that if the Fifth Circuit had applied the proper standard — the "wide range of reasonableness" set forth in *Ford Motor v. Huffman*, 345 U.S. at 338 — it would have had to conclude, as a matter of law, that the union's actions had met that standard. Nothing in the summary judgment record undermined the district court's finding that ALPA obtained "the best deal that ... [it] thought it could construct" after years of effort. (App.3 at 3.)

II.

Assuming *Arguendo* that *Vaca v. Sipes* Is The Appropriate Standard, Certiorari Should Be Granted To Review The Fifth Circuit's Improper *De Novo* Review Of The Union's Exercise Of Judgment And Its Failure To Consider This Court's Controlling Decision In *TWA v. IFFA*

The Fifth Circuit's opinion eviscerated a union's ability to exercise its discretion and seriously undermined its ability to settle disputes with employers in a manner that avoids any interruption to commerce. Even assuming that the standard under *Vaca v. Sipes* is applicable in a negotiation context, the court below engaged in an extraordinarily intrusive inquiry into the reasonableness of ALPA's balancing of risks and benefits and then improperly substituted its judgment for that of the union. The Fifth Circuit's conclusion that ALPA might be found to have breached its duty of fair representation through "arbitrary" and "discriminatory" conduct was based on two central conclusions of law, both of which were wrongly decided in conflict with this Court's decisions and those of other circuits.

First, the Fifth Circuit wrongly concluded that ALPA should have assumed, even though the law on this point was at best uncertain, that the positions previously awarded to permanent replacements under the 85-5 bid would have been available to returning strikers under an unconditional offer to return to work. Second, the Fifth Circuit concluded that the order and award could be found to have "discriminated" between strikers and non-strikers, but that conclusion directly conflicts with three decisions of this Court.¹¹ In both instances, if the Fifth Circuit had considered this Court's decision in *TWA v. IFFA*, *supra*, as well as other applicable Supreme Court precedent and decisions of other circuits, it would have affirmed summary judgment for petitioner and would not have left ALPA the burden at trial to provide a rational explanation for its "arbitrary" decision to pursue an order and award containing purportedly "discriminatory" provisions.

A. The Fifth Circuit presumed that all of the jobs covered by the 85-5 bid would have been available to returning strikers under existing law and, therefore, allowed a factfinder to conclude that the order and award was substantially worse than ALPA's existing rights under the RLA. But, as ALPA argued below, it could have required years of litigation to invalidate the results of the 85-5 bid and obtain those positions for returning strikers upon an unconditional offer to return. Also, ALPA's chances of invalidating the 85-5 bid under the RLA were speculative at best.¹² This Court's decision in *TWA v.*

Independent Federation of Flight Attendants, 109 S. Ct. 1225 (1989), demonstrates clearly the difficulty a union had in 1985 in accurately predicting recall rights of strikers without a written agreement. Nonetheless, the Fifth Circuit held that, "under ordinary seniority rules," the 85-5 bid positions would have been available to returning strikers and "[a] factfinder could infer" that strikers would have been recalled to these positions in seniority order upon an unconditional offer to return. (App. 2 at 14.) In assuming that the 85-5 bid positions were available to ALPA under the RLA, the Fifth Circuit relied on the decision in *Independent Federation of Flight Attendants v. TWA*, 819 F.2d 839 (8th Cir. 1987), which this Court subsequently reversed, *see* 109 S. Ct. 1225 (1989), and on *ALPA v. United Air Lines, Inc.*, 614 F. Supp. 1020 (N.D. Ill. 1985), *aff'd in part and rev'd in part*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987), which involved completely different facts and law.¹³

In *IFFA v. TWA*, the Eighth Circuit distinguished between flight attendants who abandoned the strike ("crossovers") and those who were hired after the strike began ("new hires") in determining their permanent replacement status. The circuit court held that crossovers were not permanent replacements and could be displaced from bid positions they obtained during the strike by returning strikers on an unconditional offer to return. Striking flight attendants were held to be permanently replaced only by newly-hired personnel who were actually employed and performing as flight attendants at the end of the strike. 819 F.2d at 842-45. This Court reversed and held that crossovers may be deemed permanent

return was similarly uncertain. *NLRB v. American Olean Tile Co.*, 826 F.2d 1496, 1500-01 (6th Cir. 1987). The order and award also eliminated that uncertainty.

13. This Court's reversal in *TWA* occurred after the briefs on the appeal in the Fifth Circuit were filed, but prior to the panel's decision. ALPA brought this Court's decision to the panel's attention in a letter dated July 6, 1989, filed to advise the panel of recent developments, and in ALPA's requests for rehearing and rehearing en banc.

11. *TWA v. IFFA*, 109 S. Ct. 1225 (1989); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); and *Ford Motor v. Huffman*, 345 U.S. 330 (1953).

12. Whether returning strikers could have displaced permanent replacements from the 85-5 bid positions was only one of several uncertainties facing ALPA. As ALPA argued below, an unconditional offer to return to work would have allowed Continental to take the position that it could refuse to recall strikers to vacant positions if they had obtained other "regular and substantially equivalent employment" or for certain "legitimate and substantial business reasons." *OCAW v. American Petrofina Co.*, 820 F.2d 747, 750 (5th Cir. 1987). Both of these rights were waived by Continental in the order and award. Moreover, recall in seniority order in the event of an unconditional

replacements under the RLA and need not be displaced from positions they obtained during the strike by more senior returning strikers, 109 S. Ct. at 1231-33, even if the crossovers abandoned the strike and were assigned positions only one day before the union unconditionally returned. *Id.* at 1240 (Brennan, J., dissenting). Whether permanent replacements are crossovers or new employees, once they begin service in their craft, as flight attendants there or as pilots here, Continental could have used the *TWA v. IFFA* rationale to argue that returning strikers could not displace working pilots from the positions awarded in the 85-5 bid.

TWA v. IFFA held that an employer can promote and reassign non-striking employees throughout the course of a strike, and may maintain its promise to keep those employees in their newly-assigned positions even after the strike concludes. *Id.* at 1231-33. That decision makes clear that ALPA had a good faith concern that the best it could expect from an unconditional return was that returning strikers could only bid for and obtain the least desirable and entry-level positions. Nothing was left in the Eighth Circuit's decision to support the Fifth Circuit's reliance on it to hold that all, or even any, of the 85-5 bid positions were guaranteed and available to the strikers for the asking. At the very least, the law was thus uncertain as to whether ALPA could have successfully challenged the 85-5 bid job awards under the RLA."

14. If the Fifth Circuit was relying on another aspect of the Eighth Circuit's ruling which was not reversed, that ruling is still inapposite. The Eighth Circuit ruled that new *applicants* for flight attendant positions who had never worked for TWA were not "employees" as defined by the RLA until they started working, and therefore were not permanent replacements. In contrast, the pilots who were awarded bid positions in the 85-5 bid were already working for Continental, were concededly "employees" under the RLA, and already had permanent replacement status. Thus, the surviving portion of the Eighth Circuit's *IFFA v. TWA* decision provides no guidance as to whether returning strikers could displace Continental's permanent replacement pilots from their positions under the 85-5 bid.

The Fifth Circuit also incorrectly relied on a district court holding in *ALPA v. United*, *supra*, for the same proposition. In *ALPA v. United*, the employer declared as of the first day of the strike that every pilot position was vacant and rebid the entire airline with non-strikers. After only four weeks, the parties settled the strike and United restored all pilots to their original pre-strike positions. However, United insisted on implementing a systemwide rebid after the strike in a manner which benefitted non-strikers over strikers. 614 F. Supp. at 1039, 1045-46. The district court ruled that United presented no valid business justification for implementing the systemwide rebid either during or after the strike and that United had acted unlawfully out of anti-union animus.

On appeal, however, the Seventh Circuit refused to subscribe to the district court's conclusion that the rebid was not justified by a business necessity. 802 F.2d at 899. The Seventh Circuit ruled that the United rebid in favor of non-strikers might be permissible under the RLA even after the strike if United could have shown that the rebid was necessary to induce pilots to cross the picket line as the "first step in rebuilding the airline's pilot structure." *Id.* The United rebid was invalidated not because the "bid positions were not filled until pilots were trained and serving in these positions" as the Fifth Circuit stated (App.2 at 14), but *only* because the evidence showed that the rebid was actually motivated by anti-union animus rather than any business need. 802 F.2d at 899-900.

The *United* holding provided virtually no support for the Continental strikers. It is undisputed that the 85-5 bid was an operational effort by Continental to fill vacancies, in the ordinary course of business under work rules that continued during the strike (App.2 at 3, 13 n.3). Moreover, Continental undoubtedly would have opposed any effort through RLA litigation to invalidate its filling of vacancies under the 85-5 bid with already working permanent replacements, as demonstrated by its September 1985 lawsuit to void the strikers' 85-5 bids. Given Continental's manifest business justification arguments, Continental enjoyed a substantial likelihood of success if ALPA

attempted to invalidate the 85-5 bid results under a *United* rationale. As a result, *United* provides no support for the Fifth Circuit's crucial presumption that ALPA would have invalidated the 85-5 bid results under the RLA in an unconditional return.

Had the Fifth Circuit correctly recognized the rights of returning strikers in 1985, it could not have permitted a fact-finder to infer that ALPA breached its DFR by concluding that the rights of strikers to obtain the 85-5 bid positions were uncertain under the RLA. ALPA's good faith decision to avoid the uncertainty of litigation in order to pursue a negotiated solution that obtained a large portion of the 85-5 bid positions and other benefits cannot, as a matter of law, be found to be "arbitrary" and support a duty of fair representation claim.

B. In addition to its failure to perceive the legal uncertainties confronting ALPA, the Fifth Circuit made a second fundamental error. The district court had concluded that there was no evidence of hostility or intentional misconduct by ALPA (App.3 at 3, 5), and this conclusion was not disputed by the Fifth Circuit. Nonetheless, the circuit court would allow a fact-finder to conclude that the order and award affected some employees differently than others and, even in the absence of any evidence of bad faith, breached the union's DFR because it was "discriminatory." (App.2 at 15.)

Specifically, the Fifth Circuit held that the order and award could be construed to discriminate against striking pilots by permitting Continental to limit the opportunities for promotion available to recalled strikers during the transitional period at the end of the strike. The court was concerned that this result was "inherently destructive of employee rights," noting that the "Supreme Court has expressed special concern for post-strike working conditions which 'create[] a cleavage. . . [between employees] who stayed with the union and those who returned before the end of the strike and thereby gained extra seniority.'" (App.2 at 15, quoting *NLRB v. American Olean Tile Co.*, 826 F.2d 1496 (6th Cir. 1987), and *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).)

Again, however, the court of appeals' holding conflicts with this Court's controlling opinion in *TWA v. IFFA*. In that case, the plaintiffs specifically argued that a carrier's refusal to displace crossovers with senior strikers after a strike constituted unlawful discrimination under *Erie Resistor* because it "will create a 'cleavage' between [strikers and non-strikers] 'long after the strike is ended.'" 109 S. Ct. at 1231 (quoting *Erie Resistor*, 373 U.S. at 231). That is the very same argument made by plaintiffs here. This Court "reject[ed] this effort to expand *Erie Resistor*" beyond its limited facts. 109 S. Ct. at 1232. The Fifth Circuit's decision directly conflicts with *TWA v. IFFA* and signals an expansion of *Erie Resistor* rather than the narrowing signalled by this Court.¹⁵

Erie Resistor involved an actual change in the seniority list so that all non-strikers would be permanently senior to the strikers. In contrast, the order and award is directly analogous to the post-strike carrier conduct approved in *TWA v. IFFA*, 109 S. Ct. at 1231:

Thus, unlike the situation in *Erie Resistor*, any future reductions in force at TWA will permit reinstated full-term strikers to displace junior flight attendants exactly as would have been the case in the absence of any strike. Similarly, should any vacancies develop in desirable job assignments or domiciles, reinstated full-term strikers who have bid on those vacancies will maintain their priority over junior flight attendants, whether they are new hires, crossovers, or full-term strikers. In the same vein, periodic bids on job scheduling will find

15. *Erie Resistor* is also inapplicable because it involved a unilateral act imposed by an employer to break a strike and not, as here, a union's right, within its wide range of reasonableness, to negotiate a transitional modification of seniority rights in order to end a strike, regain jobs, and achieve labor peace. See *Metropolitan Edison v. NLRB*, 460 U.S. 693, 705-06 (1983); *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974); *Gem City Ready Mix Co. & Jack Roberts*, 270 N.L.R.B. No. 1260 (1984), 1984-85 CCH NLRB ¶16467.

senior reinstated full-term strikers maintaining their priority....

All of these statements are equally true under the order and award.

The fact that the employer's efforts to reassign employees during the strike are not completely undone in an agreement ending the strike does not render that agreement unlawful. The employment of permanent replacements will inevitably create resentments and have effects after the strike ends; *TWA v. IFFA* holds that these are the results of permissible employer self-help. Therefore, a union cannot be held liable for failing to undo what the employer is permitted to do. If it can, the RLA's purpose to achieve consensual agreements will be severely undermined. The Fifth Circuit's decision took from the union that discretion given it by Congress and recognized in prior decisions of this Court to be necessary to the discharge of its §2 First obligations to settle labor disputes, and will allow the factfinder to impermissibly speculate as to the reasons for and wisdom of the union's decision.

III.

In The Event Certiorari Is Not Granted With Respect To The First And Second Questions Presented, Certiorari Should Be Granted To Summarily Vacate And Remand The Action For Reconsideration In Light Of *TWA v. IFFA*

As set forth in Part II, above, the Fifth Circuit's refusal to consider *TWA v. IFFA* made it impossible to apprehend correctly the uncertainty of the strikers' rights under an unconditional offer to return to work or to understand the limited nature of this Court's holding in *Erie Resistor*. By relying on the Eighth Circuit's decision which was reversed in *TWA v. IFFA* and on its own expansive interpretation of *Erie Resistor*, the Fifth Circuit determined that ALPA might be found to have acted arbitrarily and discriminatorily. The rejection of *TWA v. IFFA* raises the need for this Court to preserve the uniform administration of the federal courts. If this Court declines to grant plenary review of the Fifth Circuit's decision, we submit that the decision should be summarily vacated and remanded for reconsideration in light of *TWA v. IFFA*.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the Court issue writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit.

Dated: March 23, 1990

Respectfully submitted,

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APPENDIX I

RAILWAY LABOR ACT

SUBCHAPTER I — GENERAL PROVISIONS

45 U.S.C. § 151. Definitions; short title

When used in this chapter and for the purposes of this chapter —

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to subtitle IV of Title 49, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this chapter.

Third. The term "Mediation Board" means the National Mediation Board created by this chapter.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tippie, or the loading of coal at the tippie.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the United States District Court for the District of Columbia; and the term "court of appeals" includes the United States Court of Appeals for the District of Columbia.

This chapter may be cited as the "Railway Labor Act."

45 U.S.C. § 151a. General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. § 152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

* * *

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be

construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * *

SUBCHAPTER II — CARRIERS BY AIR

45 U.S.C. § 181. Application of subchapter I to carriers by air

All of the provisions of subchapter I of this chapter, except section 153 of this title, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

45 U.S.C. § 182. Duties, penalties, benefits, and privileges of subchapter I applicable

The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of subchapter I of this chapter, except section 153 of this title, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 151 of this title.

APPENDIX 2

**Joseph E. O'NEILL, et al.,
Plaintiffs-Appellants,**

v.

**AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL, et al.,
Defendants-Appellees.**

No. 88-2848.

**United States Court of Appeals,
Fifth Circuit.**

Oct. 31, 1989.

Marty Harper, Allen R. Clarke, Lewis & Roca,
Phoenix, Ariz., William E. Schweinle, Jr., Reginald H. Wood,
Stubberman, McRae, Sealy, Laughlin & Browder, Houston,
Tex., for plaintiffs-appellants.

Harold G. Levison, Mudge, Rose, Guthrie,
Alexander & Ferdon, New York City, John A. Irvine, Thelen,
Marrin, Johnson & Bridges, Houston, Tex., for defendants-
appellees.

Appeals from the United States District Court for
the Southern District of Texas.

Before POLITZ, DAVIS and DUHE, Circuit
Judges.

W. EUGENE DAVIS, Circuit Judge:

Joseph O'Neill, et al., (the O'Neill Group or the
pilots) appeal from the district court's grant of summary judgment dismissing their action against the Air Line Pilots Association (ALPA). We vacate the district court's dismissal of the pilots' unfair representation claim, and remand the case to

the district court for further proceedings on this count. We affirm the district court's dismissal of the pilots' claim for relief under section 101(a)(1) of the Labor-Management Reporting and Disclosure Act (LMRDA).

I.

This dispute arises out of the settlement of a two-year strike by ALPA against Continental Air Lines (CAL). The O'Neill Group were ALPA members employed as pilots by CAL, and participated in the strike against the airline.

ALPA has been the authorized and exclusive bargaining representative for the airline pilots employed by Continental Air Lines and its corporate predecessors since the 1940s. CAL and ALPA adopted their most recent collective bargaining agreement in 1982. In 1983, CAL waged a campaign to win substantial financial concessions from its employee groups, including CAL pilots. CAL and the pilots' union ultimately failed to reach a concession agreement and in September 1983, CAL filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101, et seq. CAL then repudiated its existing collective bargaining agreements with ALPA and its other unions, and unilaterally implemented its previously requested concessions as "emergency work rules," including cuts of more than fifty percent in pilots' salaries and benefits.

In October 1983, ALPA initiated a lawful pilot strike in response to CAL's rejection of its labor contract, and filed suit under the Railway Labor Act, 45 U.S.C. § 151, et seq. (RLA), to enforce the collective bargaining provisions. The strike lasted for more than two years, during which time CAL continued to operate by employing cross-overs and hiring large numbers of permanent replacement pilots. The number of working pilots grew; by August 1985, working pilots at CAL exceeded the number of strikers 1,600 to 1,000.

In June 1984, after extended litigation, the bankruptcy court approved CAL's rejection of the ALPA-CAL

collective bargaining agreement, and ordered ALPA and CAL to engage in collective bargaining over the formation of a new labor contract. CAL and ALPA met on and off until late August 1985, when CAL notified ALPA that it was withdrawing recognition of ALPA as the authorized collective bargaining representative of the CAL pilots. ALPA filed suit in the Southern District of Texas in September 1985, challenging CAL's unilateral withdrawal of recognition and its refusal to engage in further negotiations.

As part of its continuing process of filling pilot vacancies, on September 9, 1985, CAL posted "Supplementary Base Vacancy Bid 1985-5." CAL historically provided for future pilot training and staffing needs through its "System Bid" process. Under CAL's System Bid procedure, any pilot interested in a posted vacancy could submit a bid specifying the pilot's preferred positions based on status (*i.e.*, Captain, First Officer, Second Officer), base (city), and equipment type. Once pilots submitted their bids to CAL, vacant positions were allocated solely according to seniority, determined by the date a pilot first flew for Continental. Promotions to vacancies on new or different equipment from which a pilot had been trained required additional training of pilots before the vacancies were actually filled. CAL's bids were posted well in advance of these vacancies in order to schedule this training while maintaining current service. The 85-5 bid announced vacancies to be filled in 1986 for 441 future Captain and First Officer positions and an undetermined number of Second Officer vacancies. All participating pilots were required to submit their bids by September 18, 1985.

Apparently concerned by the number of future vacancies to be awarded under the 85-5 bid, ALPA's Master Executive Council for the CAL pilots (CAL MEC or the MEC),¹ authorized striking pilots to submit bids while also

1. The CAL MEC is a committee made up of pilot representatives elected by ALPA rank-and-file. The CAL MEC serves as the ALPA coordinating coun-

continuing the strike effort. Confusion over the bids tendered by several hundred strikers and questions concerning the legitimacy of their offers to return to work led CAL to challenge the strikers' bids. In late September 1985, the CAL MEC voted to continue the strike.

During October 1985, CAL and a pilots' committee, drawn from ALPA leadership and the CAL MEC, conducted negotiations under the supervision of the bankruptcy court that resulted in an October 31, 1985 consent agreement termed the "Order and Award." This order and award entered by the bankruptcy court established terms for settling both the ALPA strike and the outstanding litigation between the parties. ALPA consented to entry of the order and award without notice to or ratification by the CAL pilots or the CAL MEC.

The October 31, 1985 order and award altered CAL's standard bidding system for the 85-5 bid and the recall of striking pilots. The agreement established three options for strikers. Striking pilots who wished to return to work were required to choose either option 1 or option 3. Option 1 required strikers to waive all claims against CAL (including claims in bankruptcy for unpaid wages, and damages against CAL for abrogation of the collective bargaining agreement). In return CAL agreed to call them back to work according to "modified" seniority provisions. The relevant "transitional" modifications to seniority order and bid procedures included: (1) current working pilots (nonstrikers) were awarded the first 100 Captain positions in the 85-5 bid. These working pilots were generally ineligible for these positions under an integrated seniority list that included strikers and nonstrikers and standard bidding procedures; (2) the next seventy Captain positions were to be awarded to the seventy most senior returning strikers who waived their claims against CAL, all of whom had been Captains before the strike. In filling these seventy vacancies, CAL had the right to assign these returning strikers to the base

cil for CAL pilots, although its authority is subject to the decisions of the ALPA executive board and board of directors.

and equipment of CAL's choice. Additionally, these returning strikers were required to fly as First Officers for four months before assuming the Captain vacancies; (3) thereafter returning strikers would assume Captain positions on a 1:1 ratio with working pilots, essentially "dovetailing" a striker seniority list with a seniority list for replacement pilots.

The working pilots, following usual bid procedures, were awarded particular vacancies under the 85-5 bid on seniority according to their registered preferences for rank, base and equipment; although CAL recalled former strikers by seniority among strikers, CAL assigned each returning striker to CAL's choice of rank, base or equipment regardless of the pilots' preferences. These provisions had the effect of advancing many nonstriking pilots over more senior striking pilots, and awarding to nonstrikers the majority of the 85-5 Captain vacancies, the most desirable positions. Returning strikers, although recalled in seniority order, were required to accept the position offered by CAL, which could be a rank well below what the pilot was entitled to under seniority bidding procedures. Where a former striker upon recall was assigned initially to a First or Second Officer position, CAL had the right to assign the pilot to the base and equipment of his first Captain position as well.²

The Agreement provided for filling Captain vacancies on a 1:1 ratio between striker and nonstrikers until at least October 1, 1988. The practical effect of these "transitional" provisions was foreseeably much longer. For

2. To illustrate the effect of these transitional provisions, the O'Neill Group estimated in December 1987 that the most senior returning striker not yet flying as Captain had 23 years of seniority, held seniority number 65 on the integrated seniority list and flew as a Captain before the strike. The most senior working pilot not yet flying as a Captain had four years of seniority at CAL and held seniority number 1442. In addition, the nonstriker bid for his Captain vacancy, whereas the former striker could be assigned his base and equipment by CAL. (Instr. 163, att. 13). Under the 1:1 ratio prescribed by the Order and Award, these were the next two pilots to be promoted to Captain.

example, equipment freezes restricted the ability of pilots to change types of aircraft for varying periods of time after being trained on them (typically two years).

Option 3 permitted pilots to keep their claims against CAL, but provided that they could not return to work nor become Captains until after the Option 1 pilots. Option 3 pilots were to be recalled in the order in which they tendered their unconditional offers to return to work rather than in seniority order. CAL retained the same right to assign the Option 3 pilots to vacancies as described above for Option 1 pilots.

Option 2 covered strikers who elected not to return to work for CAL. CAL agreed to pay these pilots severance pay of \$4,000 for each year of service, up to a total dollar amount of \$2.6 million. In return, the strikers relinquished their right to recall, and released all other claims against CAL.

II.

The O'Neill Group is a certified class comprised of approximately 1,400 past and present CAL pilots who went on strike on October 1, 1983 and remained on strike through October 31, 1985, the date the strike ended. The O'Neill Group brought suit against ALPA, the CAL MEC, and certain individual negotiators in April 1986 for their roles in the strike settlement. In its complaint as amended, the O'Neill Group sought recovery on four counts. Count 1 alleged a breach of the duty of fair representation which ALPA and various ALPA officers owed plaintiffs under the RLA. Count 2 alleged a violation of the voting rights of the plaintiffs, guaranteed under section 101(a)(1) of the LMRDA, 29 U.S.C. § 411. The O'Neill Group also asserted two additional claims not relevant to this appeal.

In August 1987, ALPA moved for judgment on the pleadings and for summary judgment on all counts. The O'Neill Group's response to ALPA's motion for summary judgment was a 150-page memorandum of law and five volumes

of affidavits and other exhibits. The O'Neill Group asserted that the duty of fair representation had been breached by ALPA and various ALPA officers because (1) ALPA failed to allow ratification of the agreement and misrepresented the facts surrounding the negotiations to avoid a ratification vote; (2) ALPA negotiated an agreement that arbitrarily discriminated against striking pilots, including the O'Neill Group; (3) ALPA and various ALPA officers misrepresented to retired and resigned pilots that they would be included in any settlement; and (4) defendants were compelled by motives of personal gain, namely self-interest and political motivations. Concerning the LMRDA section 101 claim, the pilots asserted that they were entitled to vote on ratification of the agreement and order, and that liability under LMRDA is assessed against a union that violates the voting rights of all of its members as a matter of law.

Following oral argument in November 1987, the trial court ruled from the bench, granting ALPA's summary judgment motion and dismissing the pilots' suit. The transcript of the court's general bench remarks following argument provides the only explanation for its ruling.

Rather than finding the settlement "beneficial" as ALPA claimed, the trial court remarked: "that the deal is somewhat less than not particularly satisfactory is not relevant to the issue of fair representation," adding that "the agreement that was achieved looks atrocious in retrospect, but it is not a breach of fiduciary duty badly to settle the strike." The court apparently concluded that the pilots had no legal rights against ALPA because the settlement was issued as a court order, and alternatively because the agreement did not single out particular members for discriminatory treatment. "There is nothing to indicate that the union made any choices among the union members or the strikers who were not union members other than on the best deal the union thought it could construct." With respect to the pilots' claim that ALPA denied their voting rights, the district court concluded that: "in Count 2, the equality within the craft under the cases apparently precludes that claim."

The O'Neill Group appeals the dismissal of Count 1 (duty of fair representation) and Count 2 (LMRDA section 101 ratification rights) of their complaint.

III.

Our task in this case is to review the district court's determinations that no genuine issue of material fact is presented and summary judgment is proper as a matter of law. This undertaking in a complex case with a summary judgment record in excess of 6,000 pages is particularly difficult because the district court's cursory bench remarks provide little help to us in analyzing the issues. As this court reiterated recently, "Although nothing in Fed.R.Civ.P. 56, governing summary judgment, technically requires a statement of reasons by a trial judge for granting a motion for summary judgment, we have many times emphasized the importance of a detailed discussion by the trial judge." *McInerow v. Harris County*, 878 F.2d 835, 835 (5th Cir.1989), quoting, *Heller v. Namer*, 666 F.2d 905, 911 (5th Cir.1982) (footnote omitted). "In all but the simplest case, such a statement usually proves not only helpful, but essential." *Jot-Em-Down Store (JEDS) Inc. v. Cotter & Co.*, 651 F.2d 245, 247 (5th Cir.1981). "When given such aid, counsel know what issues must be met and the appellate court need not scour the entire record while it ponders the possible explanations." *Id.*

To survive summary judgment, the O'Neill pilots are required to present summary judgment evidence tending to show a genuine issue of material fact. In several recent decisions, the Supreme Court has clarified what is required of the plaintiffs by this standard. "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). "Rule 56(e) therefore requires the non-moving party to go beyond the pleadings and by . . . affidavits, or by the

'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324, 106 S.Ct. at 2553. Plaintiffs' evidence is to be believed, however, and all justifiable inferences are to be drawn in their favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986). In reviewing the district court's ruling on a motion for summary judgment, we apply the same standard that governs the district court. *Bache v. American Tel. & Tel.*, 840 F.2d 283 (5th Cir.), *cert. denied*, — U.S. —, 109 S.Ct. 219, 102 L.Ed.2d 210 (1988).

A. Fair Representation Claims

The duty of fair representation owed by a union to its members has been implied by the courts from national labor statutes. The Supreme Court has stated that the duty of fair representation imposes on the exclusive bargaining representative "a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 910, 17 L.Ed.2d 842 (1967). More succinctly, "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190, 87 S.Ct. at 916.

ALPA would have us adopt a standard which requires intentional or deliberate misconduct by the union in order to find a breach of the duty of fair representation. We consistently have held, however, that the Supreme Court's definition of the duty of fair representation enunciated in *Vaca v. Sipes* "recognizes three distinct standards of conduct." *Tedford v. Peabody Coal Co.*, 533 F.2d 952, 957 n. 6 (5th Cir.1976). See *Hammons v. Adams*, 783 F.2d 597, 601 (5th Cir.1986) ("[The union's] conduct, however, must not be 'arbitrary, discriminatory, or in bad faith;' a standard that has since been repeated by the Court with only minor rephrasing.") (citations omitted); *Christopher v. Safeway Stores, Inc.*, 644 F.2d 467 (5th Cir.1981); *Abilene Sheet Metal, Inc. v.*

NLRB, 619 F.2d 332 (5th Cir.1980); *Sanderson v. Ford Motor Co.*, 483 F.2d 102, 110 (5th Cir.1973). See also *Griffin v. Int'l Union, United Automobile A & AIW*, 469 F.2d 181, 183 (4th Cir.1972)("A union must conform its behavior to each of these three separate standards.... Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.").

A breach of the duty of fair representation does not require that a union's conduct be taken in bad faith or with hostile discrimination, but may rest upon the arbitrariness or irrationality of the union's acts. See *Bache v. AT & T*, 840 F.2d at 291. Addressing "the arbitrariness standard" this circuit has stated in *Tedford*:

We think a decision to be non-arbitrary must be (1) based upon relevant, permissible union factors which excludes the possibility of it being based upon motivations such as personal animosity or political favoritism; (2) a rational result of the consideration of these factors; and (3) inclusive of a fair and impartial consideration of the interests of all employees.

Tedford, 533 F.2d at 957 (footnotes omitted)(emphasis added).

A breach of the duty of fair representation requires more than a showing of negligence or "honest, mistaken conduct." *Amalgamated Ass'n of Street, etc. v. Lockridge*, 403 U.S. 274, 301, 91 S.Ct. 1909, 1925, 29 L.Ed.2d 473 (1971). *Accord Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71, 96 S.Ct. 1048, 1059-60, 47 L.Ed.2d 231 (1976); *Coe v. United Rubber Workers*, 571 F.2d 1349, 1350 (5th Cir.1978)(per curiam)("carelessness or inadvertence neither constitutes nor is evidence of" a breach of fair representation duty). Particularly in the bargaining context, a union's responsibilities permit the exercise of judgment within a wide range of reasonableness, "subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Hammons v. Adams*, 783 F.2d at 601, quoting, *Hines* 424 U.S. at 564, 96 S.Ct. at 1056. In order to prove a breach of the union's duty to the membership, it is insufficient to show merely "that the union

improperly balanced the rights and obligations of the various groups it represents." *Freeman v. Grand Int'l Bro. of Locomotive Engineers*, 375 F.Supp. 81, 93 (S.D.Ga.), *aff'd*, 493 F.2d 628 (5th Cir.1974).

ALPA argues that the bankruptcy court's approval of the order and award gives rise to a presumption that the settlement is fair, adequate and reasonable. We disagree; all the terms of the settlement the pilots complain of in this litigation had been resolved by ALPA and CAL before the proposed order was submitted to the bankruptcy court. The order and award therefore constituted in essence a consent decree, embodying "primarily the results of negotiation rather than adjudication." *United States v. City of Miami*, 664 F.2d 435, 440 (5th Cir.1981). We agree with the pilots that the bankruptcy court's approval of the settlement does not insulate ALPA's conduct from scrutiny, nor bar the pilots' claims. See *Ibarra v. Texas Employment Com'n.*, 823 F.2d 873 (5th Cir.1987).

We now turn to the pilots' specific arguments of how ALPA breached the duty of fair representation. The pilots' most fundamental complaint is that ALPA's strike settlement was irrational and arbitrary because of the gross disadvantages the pilots suffered under the settlement that they would not have suffered if they had simply surrendered to CAL's demands and returned to work. We are persuaded that a jury would be entitled to infer that ALPA was arbitrary in accepting the strike settlement if it finds that the union should have expected much more favorable treatment for the pilots had the pilots simply given up the strike effort and offered to return to work. In other words, a jury might reasonably find the union's conduct irrational or arbitrary if the union inexplicably agreed to a settlement that left its members in a substantially worse position than if no settlement had been made. We conclude that a jury could find that the order and award left the striking pilots worse off in a number of respects than complete surrender to CAL.

ALPA contends that the strike settlement provided for CAL to reemploy strikers who would not have

otherwise been entitled to return to work at CAL. We disagree. The striking CAL pilots who had not obtained substantially similar jobs (as pilots) continued to be employees of CAL. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378, 88 S.Ct. 543, 545, 19 L.Ed.2d 614 (1967). Because this strike was an economic one, CAL was entitled to hire permanent replacement workers to continue business operations. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46, 58 S.Ct. 904, 910-11, 82 L.Ed. 1381 (1938). Had the strike terminated without the settlement, CAL was not required to discharge these replacement workers in order to rehire the former strikers. But absent exceptional circumstances discussed below, the returning strikers, as CAL employees, were entitled to reinstatement as vacancies occurred. *Id.*

ALPA asserts several possible justifications which CAL potentially could have offered to avoid rehiring the returning strikers. These justifications include "legitimate and substantial business reasons," and striker "misconduct." See *OCAW v. American Petrofina Co.*, 820 F.2d 747, 750 (5th Cir.1987). But the summary judgment evidence provides no clear basis for this concern. Furthermore ALPA's outside legal counsel advised the ALPA leadership in September 1985 that CAL had not practiced dilatory tactics in reinstating individual strikers who offered to return to work, and consequently he felt such tactics were unlikely should ALPA submit an offer to return on behalf of all strikers. Thus a factfinder could infer that ALPA knew that CAL would not have refused to rehire strikers if ALPA had tendered an unconditional offer for the pilots to return to work.

The most fundamental rights the strikers lost in the order and award were their rights that flowed from seniority. ALPA argues that the pilots had absolutely no assurance that CAL would have recognized any of their seniority rights if they had unconditionally offered to return to work. Thus, ALPA contends that the limited seniority secured by the settlement was beneficial to the pilots. The pilots submitted strong summary judgment evidence however that CAL intended

to reinstate strikers with ordinary seniority rights and privileges after the strike ended.³ ALPA was advised by its legal counsel in September 1985 that CAL would be obligated to recall strikers in seniority order if they were still employees of the company. Accepting the pilots' evidence as true as we are required to do, a jury could reasonably conclude that if ALPA had unconditionally offered to return the pilots to duty, CAL likely would have returned striking pilots to work according to seniority, and would have permitted strikers to bid for vacancies according to CAL's seniority-based assignment procedures.

Furthermore, if the pilots had unconditionally agreed to return to work, CAL could not have changed its policy of assigning work by seniority, thereby adversely affecting returning strikers, unless it had a legitimate and substantial business justification for doing so. See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34, 87 S.Ct. 1792, 1798, 18 L.Ed.2d 1027 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 231, 83 S.Ct. 1139, 1147, 10 L.Ed.2d 308 (1963); *George Banta Co. v. NLRB*, 686 F.2d 10, 19 (D.C.Cir.1982); *Lone Star Industries, Inc.*, 279 N.L.R.B. 550, 122 L.R.R.M. 1162 (1986). Yet the order and award allowed CAL

3. For example, CAL's standard bidding procedures, awarding vacancies to the bidders with highest seniority, were in effect before and during the strike, and were not altered for replacement pilots or for individual strikers who had chosen to return to work. (Instr. 163, atts. 8,9; Instr. 149, exh. 101). CAL stated in a claim filed September 25, 1985 in the Southern District of Texas (hoping to void all 85-5 bids from strikers) that it honored pre-strike seniority of all pilots returning from the strike; that all striking pilots continued to accrue seniority during the strike; and that many strikers were eligible to win their bids for Captain positions under the 85-5 bid because of their seniority levels (Instr. 163, att. 9, ¶¶ 10,32). The record further includes evidence that ALPA discussed the subject with CAL during the September 1985 MEC meetings, and CAL indicated that it would honor an unconditional return and recall strikers in seniority order according to their bids. (Instr. 163, att. 5.5 at 166-69). CAL had returned striking flight attendants and machinists to work in seniority order, with all the benefits and privileges of seniority, after both unions tendered unconditional offers to return to work in April 1985. (Instr. 163 att. 6).

to disregard the seniority of returning strikers in awarding jobs and to assign less senior nonstriking pilots to vacant positions. If a jury accepts the pilots' evidence that CAL likely would have recognized the returning strikers' seniority rights and privileges if they had unconditionally agreed to return to work it could further infer that ALPA was arbitrary in accepting the unfavorable settlement.

We reject ALPA's argument that the 85-5 bid positions were not vacancies at the time the order and award issued because they had been assigned to working pilots by that date. In August 1985, ALPA prevailed on this issue in another suit: a federal district court held that bid positions were not filled until pilots were trained and serving in these positions. *ALPA v. United Air Lines, Inc.*, 614 F. Supp. 1020 (N.D.Ill. 1985), *aff'd in relevant part*, 802 F.2d 886 (7th Cir.1986), *cert. denied*, 480 U.S. 946, 107 S.Ct. 1605, 94 L.Ed. 2d 791 (1987). *See also Indep. Federation of Flight Attendants v. Trans World Airlines, Inc.*, 819 F.2d 839 (8th Cir.1987). ALPA, in the face of this favorable ruling in an analogous case involving striking United Airlines pilots, approved the terms of the order and award, generally permitting replacement pilots to keep the 85-5 bid vacancies awarded them, except in isolated instances where the transition provisions of the settlement otherwise provided.

In sum, the returning strikers were generally senior to the working pilots and under ordinary seniority rules entitled to fill the vacancies announced in the 85-5 bid. Yet the terms of the order and award gave the nonstriking, working pilots most of these positions. Also returning strikers who wanted to return to work were required to waive any claims for damages they had against CAL. A factfinder could infer that had ALPA unconditionally offered to return the pilots to work, the strikers would have been recalled in seniority order, and would have been able to successfully bid for these vacancies and also preserve their litigation rights against CAL.

The pilots also contend that ALPA breached its duty of fair representation by negotiating a settlement which

impermissibly discriminated against strikers. The pilots argue that the order and award impermissibly preserved strikers and nonstrikers as two distinct groups after recall so CAL could reward the nonstrikers and punish the strikers. ALPA argues it must be given broad negotiating discretion and that agreeing to an arrangement which divides CAL pilots into strikers and non-strikers for a transitional period is not per se illegal or a breach of its duty to the pilots. The Supreme Court has stated that a wide range of reasonableness must be allowed a bargaining representative in serving the unit it represents, but a union's broad authority in negotiating and administering effective agreements is not without limits. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554.

The Supreme Court has expressed special concern for post-strike working conditions which "create[] a cleavage ... continuing long after the strike is ended. Employees are henceforth divided into two camps: those who stayed with the union and those who returned before the end of the strike and thereby gained extra seniority. This breach ... stands as an ever present reminder of the dangers connected with striking and with union activities in general." *NLRB v. Erie Resistor Corp.*, 373 U.S. at 230. "These are the types of employer action that have been held inherently destructive of employee rights." *NLRB v. American Olean Tile, Co.*, 826 F.2d 1496, 1500 (6th Cir.1987). The pilots have raised a genuine issue of material fact as to whether the adverse, discriminatory post-strike treatment of strikers under the strike settlement can be justified. Depending upon the explanation offered by ALPA, a factfinder might infer that the negotiated division of pilots into strikers and nonstrikers and the subsequent unfavorable discriminatory treatment of returning strikers constituted a breach of the union's duty of fair representation.

B. Ratification Rights

The O'Neill Group asserts in its second count that the union violated section 101(a)(1) of LMRDA by denying the right of rank-and-file members to ratify the settlement agreement.

Section 101(a)(1) of LMRDA states:

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

29 U.S.C. § 411(a)(1). Section 101(a)(1) does not grant voting rights where none are conferred by a union's constitution or bylaws; rather it serves to protect the fair exercise of any rights that are provided by the union's constitution and bylaws.

The law does not require that a collective bargaining agreement be submitted to a local union or the union membership for authorization, negotiation or ratification, in the absence of an express requirement in the agreement, or in the constitution, by-laws or rules and regulations of the union. The statute [LMRDA § 101(a)(1)] does not require submission of proposed agreements or any segments thereof to the membership; nor grant members the right to vote on negotiating, executing and approving contracts.

Confederated Independent Unions v. Rockwell-Standard Co., 465 F.2d 1137, 1140 (3d Cir.1972) (citations omitted). Thus, our first inquiry is to examine whether voting rights were conferred upon the rank-and-file by the ALPA constitution or bylaws.

The ALPA constitution as amended in 1982 provided in relevant part:

Sec. 2. The conclusion of an agreement shall, at the discretion of the individual Master Executive Council, be subject to ratification.

Both parties agree that the above constitutional provision required ratification by the membership if, but only if, the MEC subjected an agreement to ratification. Thus we must decide whether the CAL MEC had determined that the proposed settlement of the CAL pilots strike required ratification before the order and award was submitted to the bankruptcy court.

The pilots contend that CAL MEC passed a resolution in September 1983 requiring pilot ratification of any agreement giving concessions to CAL. They rely upon this resolution for the right of the membership to ratify the strike settlement of October 31, 1985. The relevant portion of this states: "BE IT FURTHER RESOLVED that the final pilot cost reduction plan will be subject to membership ratification prior to final approval and implementation."

This resolution was passed by the CAL MEC during a meeting in which the MEC was debating whether to participate in a \$150 million cost reduction plan for all CAL employees. CAL had been in financial trouble for some time, and in September 1983 had submitted specific cost reduction proposals to its employee groups. A \$60 million package of pay, benefits and productivity concessions was submitted to the CAL pilots, embodied in a document known as the "New Continental Pilot Employment Policy." In its September 19 resolution, the CAL MEC agreed in principle to participate in the \$60 million cost reduction plan, but sought to negotiate over its specific terms. The MEC further resolved that the final cost reduction plan would be subject to membership ratification. CAL and ALPA did not agree on a final plan, and on September 24, 1983, CAL filed a bankruptcy petition.

The language of this resolution is unambiguous. It does not grant a blanket right to the membership to ratify all future strike settlements; it plainly accords to the membership the right to ratify the "final cost reduction plan" under discussion at that time. This resolution by its plain language does not support the pilots' asserted right to ratify the strike settlement agreement reached more than two years later.

The pilots further contend that MEC officials orally assured the pilots throughout the strike that the rank-and-file would be able to vote on any strike settlement.⁴ A factfinder might infer a breach of ALPA's duty of fair representation if it finds the union misrepresented the right of the membership to ratify any settlement agreement. *Cf. Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1397 (9th Cir.), *cert. denied*, 479 U.S. 816, 107 S.Ct. 73, 93 L.Ed.2d 29 (1986) ("a duty of fair representation cause of action can be maintained when union representatives make misrepresentations to the union membership during the ratification process"); *Christopher v. Safeway Stores, Inc.*, 644 F.2d 467, 472 (5th Cir.1981). But misrepresentations by individual MEC members or union officials to pilots do not provide the necessary express grant of a ratification right to the rank-and-file members that is required to support an action under section 101(a)(1).

Ordinarily a ratification right accorded a union's membership is contained in the union's constitution or bylaws. Here the constitution delegated authority to the MEC to decide which agreements the members were entitled to ratify. According to the CAL MEC's policy manual, MEC policy is to be established, amended or rescinded by a majority vote of the MEC. Certainly assurances by individual MEC members to rank-and-file members of a ratification right are not decisions of the MEC body. Where the voting right is not contained in the constitution and bylaws any provision for membership

4. The pilots also argue that section 101 was violated because the union failed to obtain MEC approval for the settlement as required in the MEC policy manual. But section 101 only secures certain rights of the rank-and-file members to vote and to participate in their union affairs. Thus, accepting for these purposes the pilots' interpretation of the union policy, the union's violation of the policy by refusing to allow MEC to approve the settlement is not actionable under section 101 because it is not a right granted to the rank-and-file membership. The pilots have the opportunity on remand to persuade the district court that if the policy requiring MEC approval was violated, this is a predicate for recovery on their unfair representation claim.

ratification must be clear and unambiguous; to trigger section 101 protection the voting right must be expressly granted according to established policymaking procedures. To imply a voting right where none is clearly provided would impermissibly interfere with the union's organizational structure. *See Calhoon v. Harvey*, 379 U.S. 134, 140, 85 S.Ct.292, 296 13 L.Ed.2d 190 (1964). In sum, we agree with the district court that the union members had no right to approve the settlement embodied in the order and award. Summary judgment was proper as to this claim.

C. Conclusion

Based on our review of the summary judgment record, we find at least two critical issues of material fact that preclude summary judgment on the union's duty of fair representation claim. First, a factfinder may infer that the settlement agreement negotiated by ALPA was so less favorable to the striking pilots than the likely consequences of a total surrender of the strike effort as to be arbitrary and a breach of the union's duty to fairly represent its members. A jury would also be entitled to find that the agreed-to settlement provisions breached the union's duty of fair representation because it impermissibly and unjustifiably divided the CAL pilots after recall into two camps of former strikers and nonstrikers and permitted CAL to discriminate against strikers. It is unnecessary for us to decide whether additional issues of fact are presented on this claim. We agree with the district court's dismissal of the pilots' section 101 voting rights claim.

The judgment of the district court is therefore VACATED and the case REMANDED for further proceedings consistent with this opinion.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2848

JOSEPH E. O'NEILL, ET AL.,

Plaintiffs-Appellants,

versus

AIRLINE PILOTS ASSOCIATION,
INTERNATIONAL, ET AL.,

Defendants-Appellees.

Appeals from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

(Opinion _____ October 31, _____, 5 Cir., 1989, _____ F.2d
_____)

(DECEMBER 27, 1989)

Before POLITZ, DAVIS and DUHE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of
this panel nor Judge in regular active service on the Court

having requested that the Court be polled on rehearing en banc,
(Federal Rules of Appellate Procedure and Local Rule 35) the
Suggestion for Rehearing En Banc is DENIED.

() The Petition for Rehearing is DENIED and the Court
having been polled at the request of one of the members of the
Court and a majority of the Circuit Judges who are in regular
active service not having voted in favor of it, (Federal Rules of
Appellate Procedure and Local Rule 35) the Suggestion for
Rehearing En Banc is also DENIED.

() A member of the Court in active service having requested
a poll on the reconsideration of this cause en banc, and a major-
ity of the judges in active service not having voted in favor of it,
rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSEPH E. O'NEILL, PHILLIP M. *
ORDWAY, JACK E. PENDELTON, *
CHARLES RICE, WILLIAM S. AGEE, *
D. L. BAKER, JAMES D. BATEMAN, *CIVIL ACTION
H. M. BAUER, ROBERT F. BEAGLE, *NO. H-86-1718
JAMES H. BEERER, MICHAEL J. *
BERNARDO, DAVID L. BIGELOW, *
DONALD G. BJORKLUND, WALTER E. *
BLORE *

versus

AIRLINE PILOTS ASSOCIATION *
INTERNATIONAL, CONTINENTAL *
AIRLINES MASTER EXECUTIVE *
COUNSEL, HENRY A. DUFFY, D. *
KIRBY SCHNELL, R. PETER LAPPIN *
DONALD A. HENDERSON *

* Houston, Texas
* November 30th,
* 1987 2:30 P.M.

COURT'S RULING
BEFORE THE HONORABLE LYNN N. HUGHES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Stubbeman, McRae,
Sealy & Browder, Inc.
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THE COURT: Thank you. Be seated.

Even though the hour is late, I am going to give a general outline of my judgment in this case and produce a written document. The written document may vary a little because I may omit things or modify it, but I think the parties, for their own purposes, need to know the general nature of the resolution as soon as possible.

I am going to grant the Defendant's Motion For Summary Judgment.

I think the order signed by Judge Roberts is inescapably an order. Under the circumstances of the existing bankruptcy law since there was little that Continental could do without the approval of the Court, the approval of the Court in this instance, however minor, the Court's contribution to the terms of the resolution, the Court's participation was essential.

Now, that's a fairly narrow holding and I am not saying all agreed orders are not contracts and similar things, but under the circumstances of this case, beyond that, in the alternative, I am not going to rule under Count 1 on the nature

of the resulting relationship between Continental and a retired pilot because the retirement questions are subjudice elsewhere.

So assuming that the October 31 transaction were merely an agreement, the Court finds that the Union did not breach its duty of fair representation.

There is nothing to indicate that the Union made any choices among the Union members or the strikers who were not Union members other than on the best deal that the Union thought it could construct; that the deal is somewhat less than not particularly satisfactory is not relevant to the issue of fair representation.

In Count 2, the equality within the craft under the cases apparently precludes that claim.

As I've indicated before, that in no way means that either Congress or the Court intended to cleanse or approve of failing to do something that they should do to everyone.

That may save it from that statutory violation, but that's not an endorsement of practice.

The variation on the theme in Count 3 under the various sections of the statutes has the same result and that is that the activities of the Union may be characterized as sloppy, ineffectual, short-sighted or some other value judgmental result, but that is not the same as to say it is a violation of a statutory duty to any particular pilot or group of pilots.

The Court is concerned about the August 1984 resolution being secret. It, of course, was not secret from the 9-member committee who purportedly represented the Union, but I do not think it is properly part of the policy of this operating division of ALPA.

However, that's not much comfort to the Plaintiffs because what was done through other meetings was sufficient, I think, to confer authority on the negotiating agents for the MEC, who were the general agents for the membership.

I have seen nothing in the documents that would preclude the conferring of a plenary binding general agency on some representative sent to negotiate the contract, whether it's a working agreement or a back-to-work agreement.

The Court does not then need to decide whether a working agreement is categorically different from a back-to-work agreement in this case and, therefore, not subject to the strictures of Section 17 Policy Manual.

It seems to the Court that the circumstances, it would make a back-to-work agreement susceptible to short, dead lines, crises of operation, crises of administration and other limitations in the orderly process of the Union would also frequently be true of the ordinary working agreement negotiations.

The failure of the Union to follow a number of the procedural steps, while bad practice and undesirable policies, does not amount in this case as a matter of law to a breach of fiduciary duty.

Since the agreement that was achieved looks atrocious in retrospect, but it is not a breach of fiduciary duty badly to settle the strike and I suspect if all the parties had it all to do all over again, most of them would have adopted different tactics throughout the entire labor problems with Continental.

The loss to the Plaintiffs, while not technically money or property under the cases, are rights of considerable economic importance.

Count 4 which I earlier characterized as a common law breach of fiduciary duty falls for essentially the same underlying, undisputed fact reasons that the statutory claims under Count 3 fall and that is that none of the statutes nor common law entitle the pilots to a risk-free choice in their decisions in dealing with what was indisputably a hostile intransigent employer.

It is only natural and human for the pilots to feel displeased with the Union. That does not amount to a breach of

the Union's fiduciary duty to this group or its individual components.

I don't think that the behavior of the Union has been shown to have any segment of proclivity to it except in the pilots' view that they ultimately end up cooperating with Continental Airlines.

From that fact alone and from the fact that they used every tactic available to them to insure that their resolution of the dispute would not be upset cannot be translated into personal animosity or illegal motives against these pilots.

Although I don't think the Court needs to reach it, the Court is somewhat troubled by the argument that ratification was not necessary because it wasn't a labor agreement because we didn't cover everybody and couldn't cover everybody because we weren't the bargaining agent any more.

That seems to me to be fairly circular and to say it was all right to violate your agency with these pilots because to attempt to represent them completely would have required that you violate the Railway Labor Act and to put it ahead of their policies doesn't seem substantial.

I don't understand the labor law to have precluded the Union from having discussed the future of non-Union strikers or other conditions and terms of Continental's employment practices that might affect people other than their direct membership.

If I am wrong about that, you can supply me a case; but so far I have not understood anything in these statutes to have precluded the Union from structuring a larger settlement than its membership alone, and I'm obviously not deciding whether or not ALPA was the designated bargaining representative for Continental at this time. That's covered by the other case, too, I believe.

All right. That may not be as lucid as it ought to be, but I'm either sorry or grateful that I do not spend as much

time in labor law as you gentlemen do. I am sorry you counsel do, but I will try to write it down so it will make sense and you can file your Motion For Reconsideration.

Anything further this afternoon?

MR. LEVISON: No, Your Honor.

MR. HARPER: Thank you, Your Honor.

THE COURT: Thank you, counsel.

APPENDIX 4

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: :
CONTINENTAL AIRLINES :
CORPORATION, :
CASE NO. 83-04019-H2-5 :
CONTINENTAL AIR LINES, INC., :
CASE NO. 83-04020-H1-5 :
TEXAS INTERNATIONAL AIRLINES, :
INC., :
CASE NO. 8304021-H3-5 :
TXIA HOLDINGS CORPORATION, :
CASE NO. 83-04022-H3-5 :
DEBTORS :
CONSOLIDATED UNDER :
CASE NO. 83-04019-H2-5 :

ORDER RELATIVE TO CLAIMS,
CONTROVERSIES AND RELATED LITIGATION

This matter has come on before the Court upon the joint motion and request of the above-named Debtors (hereinafter "Continental") and the Air Line Pilots Association, International (hereinafter "ALPA"), for the entry of an Order resolving their pending claims, controversies and related litigation.

Pursuant to orders of this Court dated July 2, 1985, Continental and ALPA have been engaged in lengthy and complex negotiations to settle and compromise their disputes, to end the ongoing ALPA strike against Continental, to resolve all other pending claims and litigation and to assure a fair and

equitable treatment of all pilot employees of Continental — those now at work and those on strike. Settlement discussions between Continental and ALPA have continued non-stop since October 18, 1985. Continental and ALPA have consented to have this Court resolve all outstanding issues submitted to this Court.

After considering all matters and issues before the Court as between Continental and ALPA, this Court, in the exercise of its equitable powers pursuant to Section 105 of the Bankruptcy Code, and as an interest arbitrator pursuant to the agreement and consent of ALPA and Continental, hereby makes the following findings and orders:

1. Continental and ALPA have consented in open Court on October 30 and 31, 1985 to the entry of an Order by this Court, both in its Judicial capacity and as a Interest Arbitrator (the latter designation having been specifically requested, agreed and consented to by Continental and ALPA in open Court on this date) to render a final, binding, non-appealable decision on all outstanding issues as between Continental and ALPA; and

2. Continental and ALPA have further agreed in open Court, both by and through statement of counsel and by authorized representatives on October 30, 1985 to waive any right to appeal, modify or otherwise challenge the decision and award of this Court with respect to all issues as between Continental and ALPA.

Based on the foregoing, it is accordingly ORDERED, ADJUDGED and DECREED:

1. The determination and resolution of claims and controversies is set out in Exhibit "1"; and

2. Continental and ALPA are ordered and directed to take such steps as are necessary to implement in Exhibit "1" to this Order; and

3. Continental and ALPA are ordered and directed to file such pleadings as are necessary to dismiss all litigation pending between them in the Bankruptcy Court, any United States District Court, any United States Courts of Appeals, or otherwise, as such litigation is more specifically set out in attachment "B" to Exhibit "1" hereto.

It is so ORDERED, ADJUDGED AND DECREED this 31st day of October, 1985.

/s/

T. GLOVER ROBERTS
UNITED STATES BANKRUPTCY
JUDGE

ORDER AND AWARD

I. Termination of Strike and Back To Work Issues

A. General

1. **Termination of Strike.** Effective with the entry of this Order and Award, ALPA shall terminate its strike against Continental Airlines and all picketing, job actions, boycotts, disparagement and public statements by ALPA, (or any ALPA spokesman, representative, officer or agent) critical of the pilots or operations of Continental Airlines and all other strike-related activities directed against Continental, or any affiliate of Continental shall cease.

2. **No Recrimination or Retaliation.** No pilot shall be subject to discrimination, fines or harassment, either by ALPA or by the Company, due to legally protected strike activities, work during the strike or service as a replacement pilot during the strike period. These assurances against recriminations or retaliation expressly apply to employment or reemployment at Continental or at another employer. This will not affect ALPA's right to determine who will be continued as a member or readmitted to membership.

3. **Terminated Pilots.** All striking pilots terminated for cause between September 24, 1983 and the date of this Order and Award, except those convicted of a felony offense, shall have the right to submit their cases to arbitration, as provided in Section V below; such pilots shall not be eligible to elect to return to work unless and until reinstated as a result of such arbitration.

B. Reinstatement Rights and Procedures

1. **Right to Reinstatement** All pilots on the July 31, 1983 seniority list who are not currently active or on authorized leave and who have not resigned, retired, or been terminated for cause (subject to reinstatement by arbitration pursuant to section I.A.3.) shall be eligible to elect recall and reinstatement in accord with the procedures set forth herein. All such pilots who elect recall and resolution of their claims against Continental, its employees and affiliates, as provided in Section III.B.1., infra, shall be placed on a new preferential recall list in seniority order, and shall be treated for purposes of this Order and Award as having made an offer to return to work as of September 15, 1985. Such a pilot who elects recall but does not wish to resolve his/her claims in said manner shall be placed on the recall list and recalled subsequent to the recall of waiving pilots in the order in which his/her unconditional offer to return to work was received by Continental.

2. Filling of Vacancies.

(a) **New Vacancies.** All future vacancies will be made available to eligible working pilots and returning strikers in accord with the provisions of this paragraph 2. "Vacancy" as used herein means any unstaffed pilot position which results from systemwide expansion or attrition; a redistribution of aircraft or flight time which does not result in a net increase in the total number of system Captains or the total number of system First Officers does not create a "vacancy". No working pilot (including training, supervisory and management pilots) shall be displaced in status from his/her awarded bid position as a result of the return to work of a striking pilot. Except as provided in sub-paragraphs (b) and (c) below, striking pilots who are reinstated will thereafter bid with working pilots and pilots on approved leaves of absence for all new vacancies. A pilot who has elected the Recall Option must thereafter accept a vacancy offered to him/her; a pilot who declines to accept such a vacancy shall be removed from the seniority list and shall have no further rights under this Order and Award. A pilot has an obligation to keep Continental current on his/her address for contact.

(b) Initial Assignments. The status of a returning striker (Captain, First Officer, Second Officer) shall be determined on the basis of seniority among available vacancies in accord with the provisions of subparagraph (c), infra, provided that (1) any pilot who was not holding a Captain position as of September 24, 1983 and who has been out of Continental service for a period in excess of 24 months prior to his/her return to service shall be required to fly six (6) months in a First Officer position before being eligible for assignment to a Captain position; and (2) any pilot who held a Captain position as of September 24, 1983 and who has been out of Continental service for a period in excess of twenty-four (24) months prior to his/her return to service, shall be required to fly four (4) months in a First Officer position before being eligible for assignment to a Captain position. The initial base and equipment of a returning striker shall be assigned by the Company; the base and equipment of a returned striker in his/her initial post-strike service as a Captain may also be assigned by the Company. Thereafter base and equipment will be determined in accord with the Pilot Employment Policy.

(c) Allocation of Vacancies: Transitional Provisions. In light [of] the unique circumstances of this Order and Award, current and future vacancies shall be allocated in accord with the following provisions of this subparagraph (c).

(i) All pilots awarded positions on Vacancy Bid 1985-5 shall receive the position awarded, subject only to delay to a date necessary to accommodate the return of striking pilots in accord with the provisions of this paragraph (c). The Company may reallocate the awarded vacancies on that bid to different equipment within status where necessary to accommodate changes in the projected fleet, provided that the total number of awarded vacancies by status shall not be increased by such an adjustment.

(ii) Currently working pilots shall assume the first 100 Captain positions awarded in Vacancy Bid 1985-5. Subject to the provisions of subparagraph (b), the next 70 Captain positions shall be awarded in seniority order to returning strikers who have resolved their claims against

Continental, its employees and affiliates, as provided in Section III.B.1., infra. Thereafter returning strikers shall assume Captain positions on a 1:1 ratio with working pilots (i.e. every other Captain position to a returning striker); said ratio shall remain effective unless and until changed as provided in subparagraph (c)(v) below. The award of 70 Captain positions to such returning strikers shall commence no later than May 1, 1986 and be accomplished no later than August 1, 1986. In the event any of these positions is not available by August 1, 1986, the Company will pay protect each adversely affected First Officer at Captain rates of pay until that First Officer achieves a Captain position.

(iii) The Company will make available to returning strikers who have resolved their claims against Continental, its employees and affiliates, as provided in Section III.B.1.-2., infra, 70 First Officer vacancies, commencing as of January 1, 1986, on a schedule sufficient to allow returning strikers to assume the 70 Captain positions made available by subparagraph (c)(ii), supra. Thereafter, the Company will award sufficient First Officer positions to returning strikers to provide for advancement to Captain in accordance with the schedule and ratio set forth above.

(iv) Following the award of 70 Captain positions to returning strikers, additional captain positions are projected to become available according to the following schedule, to be filled by working pilots and returning strikers on a 1:1 basis:

- (a) 46 additional Captain positions by 10/1/86;
- (b) 46 additional Captain positions by 1/1/87;
- (c) 46 additional Captain positions by 7/1/87;
- (d) 46 additional Captain positions by 1/1/88;

- (e) 46 additional Captain positions by 7/1/88.

In the event any of the foregoing Captain positions is not available by the projected date, the Company will pay protect each adversely affected First Officer at Captain rates of pay until that First Officer achieves a Captain position. In the event of increases to staffing requirements, the projected Captain vacancy schedule will be accelerated accordingly and will continue to be allocated on a 1:1 basis between working pilots and striking pilots.

(v) The 1:1 ratio for filling Captain vacancies shall remain in effect until October 1, 1988. The question of what ratio for Captain vacancies should remain in effect beyond that time shall be submitted to final and binding arbitration in accord with the following provisions. The arbitrator or the method for selection of the arbitrator shall be designated by the parties in a side agreement. Either the Company or any affected pilot may request the commencement of an arbitration proceeding on or about April 1, 1988. The Company or the affected pilot shall thereupon notify the arbitrator and the parties shall jointly schedule an arbitration, which must be commenced within sixty (60) days of the initial request. The arbitration shall be conducted in accord with the rules and procedures of the American Arbitration Association and any resulting Award shall be subject to review and/or enforcement under the U.S. Arbitration Act. The affected pilot(s) may designate any personal representative to appear in his(their) behalf. The arbitrator shall take into account all relevant facts and circumstances in reaching his decision; in no event shall the final ratio be zero for either the working pilots or the striking pilots.

(vi) Striking pilots awarded the first 70 First Officer positions which become available to returning strikers shall not be assigned a Second Officer vacancy in the interim; all other returning strikers must accept assignment to available vacancies in seniority order subject to the provisions of this paragraph 2.

(vii) For purposes of this Order and Award, "returning striker" means a pilot on strike as of September 15, 1985 (including those then on the preferential recall list) who

elects recall pursuant to the terms of this Order and Award; "working pilot" means a pilot in active service (including flight instructors, supervisory and management pilots), in training, or on authorized leave as of September 15, 1985. New hire pilots who received employment commitments prior to September 15, 1985, but entered training thereafter shall be entitled to hold Second Officer positions until entitled to advance to other positions in accord with the Pilot Employment Policy. It is understood that the Company may advance the dates of assignment as Captains (subject to the provisions of subparagraph b).

(d) Reductions In Force. In the event of a future reduction-in-force, pilots will be displaced in status and/or furloughed on the basis of seniority; in any subsequent recall, pilots displaced or furloughed as a result of the reduction in force shall be reinstated in their former positions prior to (1) the advancement in status of any other pilot to such positions and (2) the recall of any pilot then on the preferential recall list.

3. Seniority List.

(a) The CAL/TXI integrated pilot seniority list effective July 31, 1983, will be revised by deleting all pilots who have resigned, retired, elected severance, not responded to the Notice in paragraph 5(a) below, or been terminated for cause (subject to reinstatement by arbitration pursuant to paragraph I.A.3.). Pilots presently classified as permanently disabled will be treated in accord with subparagraph (b), below. Pilots on furlough status as of September 24, 1983 who are not currently active or on authorized leave may have their seniority adjusted to reflect credit only for periods of active service in accord with subparagraph (c) below. All pilots hired since October 1, 1983 will be placed on the revised list in order of date of hire and date of birth within training class. The new list will be published forthwith.

(b) Pilots on permanent disability status as of the date of this Order and Award will be given the option to elect a return to active service, or alternatively, to be removed from the Seniority List, in accord with the following procedures. Each such pilot will be notified of his options in accord with Section I.B.5. of this Order and Award; a pilot who

elects to pursue recall will be given a medical and/or psychiatric examination (as appropriate, based on the nature of disability) by a Company-selected medical examiner on or before January 15, 1986 to determine eligibility for recall. If the pilot is deemed by the medical examiner to be medically certifiable for active flight duty on or before December 31, 1988, such pilot will be retained on the seniority list and will be activated as soon as medically qualified; such pilot will remain on permanent disability status until activated. If a pilot should fail to so qualify for active flight duty on or before December 31, 1988, or voluntarily elects not to seek recall, his name shall be permanently removed from the seniority list and he shall have no further rights of recall or reinstatement; the disability benefits of such a pilot shall continue without interruption.

(c) Pilots on the integrated pilot seniority list effective July 31, 1983 who were on furlough status as of September 24, 1983 and who are not currently active or on authorized leave shall remain on the seniority list in accord with the provisions of this paragraph. The seniority and seniority number of such striking pilots holding seniority numbers up to and including No. 1897 shall remain intact and unaffected. The seniority and seniority number of such striking pilots holding numbers 1898 through 2025 will be subject to a seniority integration process with pilots hired since September 24, 1983 whereby each such returning furloughed will be assigned a revised seniority number upon the earlier of (1) his return to pay status or (2) January 1, 1987; the revised seniority number will be based on that pilot's length of active service as of the date of such assignment in relationship to the length of active service of pilots hired since September 24, 1983, i.e. the returning furloughed's new seniority number will be in rank order behind a pilot with more time in active service and ahead of a pilot with less time in active service. Time on leave, on furlough, on strike or awaiting recall does not constitute active service for purposes of this Section. This Order and Award modifies the Seniority Integration and Fence Agreement executed August 18, 1982 and the integrated seniority list issued pursuant thereto.

4. **Retention of Recall Rights.** All pilots electing the option of returning to work will retain their right to reinstatement until December 31, 1988; if such a pilot has not been reinstated by that date, his/her name shall be removed from the seniority list and s/he shall have no further right to recall or other rights under this Order and Award; provided, however, that in the event of a reduction in force commencing between the date of this Order and Award and December 31, 1988, the period of time during which recall rights remain in effect shall be extended beyond December 31, 1988 for a length of time equal to the length of time such a reduction in force remained in effect.

5. **Notification and Recall Procedures.**

(a) Within ten days of the date of this Order and Award, the Company shall mail the attached Notice of Options to all striking pilots to advise them of their options under this Order and Award. (Notice to be drafted as Attachment A).

(b) All pilots so notified in writing will have twenty-one (21) days from their receipt of said Notice to advise the Company in writing of their intent to return to work or elect any other option(s) made available to them by this Order and Award. A pilot who receives said Notice, or who refuses or avoids said Notice, and fails to respond and elect his options within the time specified shall have his/her name removed from the seniority list and shall have no further rights under this Order and Award.

(c) If the Company is unable to notify a pilot concerning reinstatement and other options made available by this Order and Award, the Company shall temporarily bypass for reinstatement such pilot. The Company and ALPA shall attempt to locate such pilot and deliver said Notice for a period of forty-five (45) days from the date of mailing her/his Notice. If such pilot has not then been located by either party and acknowledged receipt of the Notice of Options his/her name will be removed from the System Seniority List and he/she shall have no further rights under this Order and Award.

(d) For the purposes of this Section, "notified in writing" means attempted delivery to the last known address by the U.S. Postal Service of a letter sent Certified Mail, marked "Deliver to Addressee Only" and return receipt requested.

(e) A pilot electing reinstatement will subsequently receive a separate Recall Notice specifying a scheduled reporting date for training. Upon recall, a pilot will be allowed at least fourteen (14) days, from the date of the recall notice, to report for training. A recalled pilot shall confirm to the Company in writing within five (5) days of receipt of recall notice that he will return to service and report for training as scheduled. A pilot who fails to confirm his intention to return or to actually report for training within the time frame specified above will be considered out of the service of the Company and his/her name will be removed from the System Seniority List. For the purposes of this paragraph all required written notices between the Company and the pilot means attempted delivery to the last known address by the U.S. Postal Service of a letter sent Certified Mail, marked "Deliver to Addressee Only" and return receipt requested.

6. Medical Qualification of Returning Pilots.

(a) Each returning pilot must complete a Company physical and psychological examination. Additionally, each returning pilot must maintain a Class I Federal Aviation Administration Medical Certificate; however, those returning to First and Second Officer positions may utilize the Class I FAA Medical Certificate for a period of twelve (12) months or as consistent with Federal Air Regulations. If a pilot cannot maintain the Class I certificate, s/he will so notify the Company in writing and will thereafter be permitted to bid only for vacancies in a status which his/her medical certificate, seniority and FARs allow him/her to hold.

(b) In the event a pilot fails to pass the Company physical examination, the following procedure will

apply except in those cases where disqualifying drugs have been detected in the drug screen test*:

(i) A copy of the findings of the Company medical examiner shall be furnished to the pilot within fifteen (15) days. In the event that the pilot disagrees with such findings, the pilot may, within seven (7) days, employ a qualified medical examiner of his/her own choosing and at his/her own expense for the purpose of conducting a second medical examination.

(ii) In the event that the findings of the medical examiner chosen by the employee disagree with the findings of the medical examiner employed by the Company, the Company will, at the written request of the employee, given within seven (7) days of such disagreement, ask that the two medical examiners agree upon and appoint a third, qualified and disinterested medical examiner, preferably a specialist, for the purpose of making a further medical examination of the employee.

(iii) The said disinterested medical examiner shall then, as soon as practicable, make a further examination of the pilot in question and the case shall be settled on the basis of his/her findings. Copies of such medical examiner's report shall be furnished to the Company and to the pilot as soon as practicable.

(iv) The expense of employing the disinterested medical examiner shall be borne one-half by the pilot and one-half by the Company.

7. Compensation While in Training.

A returning pilot in training at a place other than his/her last home base shall be provided lodging, transportation and per diem as specified herein:

* A pilot adversely affected as a result of a drug screen test shall have the right to grieve any adverse action in accord with the Pilot Employment Policy.

(a) Pilots shall be provided suitable single room accommodations and shall be provided, or reimbursed with proper documentation, reasonable transportation to and from the training facility and the airport.

(b) The Company shall teletype an on-line, round-trip positive space (PS-5) pass authorization to the on-line city nearest such pilot's location if s/he is not residing in the city where his/her training is to be provided. Such passes shall be available at the ticket counter and valid for use two (2) days prior to the pilot's scheduled report date for training until two (2) days following the day his/her training is completed. If the pilot is unable to travel during these two (2) days due to passenger loads, his/her pass authorization shall be renewed as needed. A pilot who is unable to travel to training due to passenger loads shall be offered and assigned alternative training sessions and s/he shall not have his/her return to active duty affected due to his/her inability to travel.

(c) The Company shall teletype an on-line positive space (PS-5) pass authorization to the on-line city nearest a pilot's location in order for him/her to report for his/her first day of duty with the Company if s/he does not reside in the city where his/her Home Base Domicile is located. Such pass shall be valid for use two (2) days prior to the date s/he is scheduled to report for duty with the Company.

(d) A pilot, when in training, shall be paid per diem in accord with the Pilot Employment Policy. A pilot will be placed on the payroll after five (5) days in training whether or not s/he has completed training; the pay status will be that of the position the pilot is expected to occupy on his first day of active service as a line pilot.

8. (a) Training will be accomplished in accordance with the Company's FAA Approved Flight Crew Training Manual. In addition to the syllabus of training outlined in the manual, up to two additional simulator periods will be scheduled if necessary to satisfactorily complete the required training periods. Scheduling of training will normally insure changes of instructor. If a pilot fails to qualify, he/she will repeat the syllabus including the two extra simulator periods if required after a maximum fourteen (14) day period free of all

duty. The syllabus may be reduced during the second training cycle by the pilot if desired, i.e., ground school, CPTs, etc.

(b) The disposition of a pilot who fails to qualify after the second training cycle will be determined by the Vice President-Flight Operations, subject to the pilot's right to pursue the dispute resolution procedure in Section V below. Nothing herein shall constitute a requirement that the Company maintain a permanent First or Second Officer position for a pilot who has failed to qualify for a promotion to Captain.

9. Striking pilots who elect recall will accrue seniority for all purposes during period of strike and while awaiting recall; such pilots will not accrue longevity credit for active service for purposes of pay and vacations for such periods. Pilots who were not in continuous active service from October 31, 1983 through December 31, 1983 shall not receive any stock or other rights under the Stock Bonus Plan.

II. Severance Option And Claims Waiver

A. Severance Pay and Claims Waiver

1. Each active pilot on the CAL/TXI integrated seniority list as of September 24, 1983, as revised by Paragraph I.B.3., including those pilots who have been terminated (subject to reinstatement by arbitration pursuant to Section I.A.3.) who (a) has not died, resigned, retired, or become permanently disabled, and (b) who is currently on strike and (c) who is not employed (on the active payroll) as a pilot by an F.A.R. Part 121 air carrier as of the date of this Order and Award will be given the option of electing Severance Pay, in exchange for (1) waiver of his/her right to recall and (2) waiver of all claims against the Company, its employees and affiliates, as set forth in paragraph II.C. below. A pilot electing this Severance Pay Option shall notify the Company of his election within twenty-one (21) days following his receipt of the Notice provided pursuant to Section I.B.5; such election shall be irrevocable and shall constitute resignation of his/her seniority number and a waiver of all further rights to recall or reinstatement. The Severance Pay Option shall be deemed waived and unavailable to any pilot who does not notify the

Company in writing of his election of the Severance Option within twenty-one (21) days of his receipt of the Notice of Options provided pursuant to Section I.B.5, supra. The parties shall cooperate in identifying those pilots employed at Part 121 air carriers.

2. The amount of Severance Pay for each pilot eligible to elect this option pursuant to paragraph 1 will be calculated by multiplying \$4,000 times the number of years of active service with the Company as of September 24, 1983; provided however, the total dollar amount of severance pay for those pilots electing severance who were not drawing ALPA strike benefits as of September 15, 1985 and were not on furlough status as of September 24, 1983 shall not exceed \$2.6 million. In the event a sufficient number of pilots in this category elect severance pay which causes the dollar amount to exceed \$2.6 million, the \$4,000 multiplier shall be reduced sufficiently so that pilots in this category do not receive a total aggregate severance pay distribution exceeding \$2.6 million. Years of service will be calculated by crediting the pilot with one (1) year of active service for each calendar year of active service as a pilot, with partial years to be pro-rated, during the period beginning with the pilot's date of hire shown on the CAL/TXI integrated seniority list and ending on September 24, 1983.

3. A pilot on furlough status as of September 24, 1983 who is not currently active (including those pilots who have been terminated (subject to reinstatement by arbitration pursuant to Section I.A.3.) and who has not died, resigned, retired, or become permanently disabled and who is not employed (on the active payroll) as a pilot by a Part 121 air carrier as of the date of this Order and Award will be given the option of electing Severance Pay subject to the same waivers and procedures set forth in paragraphs II.A.1-2., supra, provided that the severance rate will be \$2,000 per year of active service as of September 24, 1983. The parties shall cooperate in identifying those pilots employed at Part 121 air carriers.

4. The schedule for payment to those electing this Severance Pay Option will be as follows:

10% - on or before
December 15, 1985

15% - upon confirmation
of a reorganization plan, but in no
event later than June 30, 1986.

Balance - quarterly pay-
ments in accordance with the fol-
lowing schedule commencing
September 30, 1986.

- (a) 1 year - 5 years active ser-
vice - 4 quarterly payments
- (b) 6 years - 10 years active
service - 8 quarterly pay-
ments
- (c) 11 years - 15 years active
service - 12 quarterly pay-
ments
- (d) 16 years - 20 years active
service - 16 quarterly pay-
ments
- (e) 20 years + active service -
20 quarterly payments

The Company may accelerate the timing and/or increase the amount of such payments.

Interest at a rate of 10% shall accrue on amounts which remain due after eight quarters from September 30, 1986. The Company shall not be responsible for withholding FICA or FIT from these payments but will supply each payee with an annual Form 1099 showing the amount paid in each taxable year.

B. Early Out Pass Privileges and Claims Waiver

1. Each pilot on the CAL/TXI integrated seniority list who was in furlough status as of September 24, 1983, and who is not currently active and who has not resigned, retired, or been terminated for cause (subject to reinstatement by arbitration pursuant to paragraph I.A.3.) and who is not employed (on the active payroll) as a pilot by a Part 121 air carrier as of the date of this Order and Award, shall be eligible (in addition to severance pay pursuant to Section I.A.3.) to elect Early Out Pass Privileges as set forth in subparagraph B.2. infra in exchange for (1) waiver of his/her right to recall and (2) waiver of all claims against the Company, its employees and affiliates, as set forth in subparagraph II.C. below. A pilot electing this Early Out option shall notify the Company of his election within twenty-one (21) days following his receipt of the Notice provided pursuant to Section I.B.5.; such election shall be irrevocable and shall constitute resignation of his/her seniority number and a waiver of all further rights to recall or reinstatement. The Early Out Option shall be deemed waived and unavailable to any pilot who does not notify the Company in writing of his election of the Early Out Option within twenty-one (21) days of his receipt of the Notice of Options provided pursuant to Section I.B.5., supra.

2. Pilots electing this Early Out option shall receive pass privileges commencing January 1, 1986, as follows:

Pass Privileges (on-line only)

<u>Hire Date</u>	<u>Annual On-Line Round- Trips</u>	<u>Service Charge</u>
August 1, 1965 or before	20	(Same (As For
August 2, 1965 through August 1, 1975	8	(Active (Employees
August 2, 1975 through August 1, 1980	6	(Employees (
August 2, 1980 through August 1, 1982	4**	(

The number of passes per year is an equal number for the employee and the same number of additional passes for each eligible immediate family member. All pass privileges are subject to Company rules concerning pass privileges; violation of those rules may result in suspension or termination of pass privileges. Any personal income tax consequences arising from use of passes will be the responsibility of the employee. While there are currently no taxes applicable, we cannot predict what the IRS requirements may be in the future. Service charges apply.

**The pass benefit in this category (3 to 5 years of seniority) expires five years from the date of resignation or upon the death of the employee. The benefit for the other categories is for the lifetime of the employee.

C. Waiver of Claims.

As a condition to election of the Severance Pay Option or the Early Out Option, each pilot who desires to pursue either Option shall be required to (a) execute a waiver and release of any and all legal claims of any nature against Continental Airlines, its employees (including officers and directors) and affiliates (including Texas Air Corporation) and their employees (including officers and directors), except bankruptcy claims for 1) unpaid pre-petition wages (including bank time and earned per diem) 2) unpaid pre-petition medical and dental expense claims, 3) accrued but unused vacation and 4) reimbursable pre-petition expenses (including moving expenses) (the "surviving bankruptcy claims"), (b) to commit these surviving bankruptcy claims to a trustee to be named by the Company for voting purposes only, with instructions to vote the claims in support of Continental's proposed Reorganization Plan; and (c) to agree to be subject to all the actual final amount due for the surviving bankruptcy claims shall be determined by informal conference between the Company and the employee; in the event of continued disagreement, the final amount due will be determined pursuant to procedures approved by the Bankruptcy Court. The final amount due will be paid in accord with the terms of the final Reorganization Plan to be approved by the Bankruptcy Court.

III. Other Claims and Litigation

A. ALPA Bankruptcy Claims

All bankruptcy claims filed by ALPA, and all motions and appeals relating thereto, shall be withdrawn and treated as settled and dismissed with prejudice; this provision shall not apply to (1) issues relating to unpaid pre-petition contributions owed by Continental to the Pilot Pension "B" Plan, which issues shall be subject to resolution outside the scope of this Order and Award; (2) the ALPA claim for prospective medical insurance costs for pilots who were in retired status as of September 24, 1983, which shall be subject to resolution as a Bankruptcy Claim but subject to a maximum cap on total liability of \$500,000.

B. Individual Claims

1. Undisputed Items to Be Paid. Continental will pay 100% of the bankruptcy claims of all pilots, for 1) unpaid pre-petition wages, (including bank time and earned per diem), 2) unpaid pre-petition medical and dental expense claims, 3) accrued but unused vacation and 4) reimbursable pre-petition expenses (including moving expenses), subject only to final determination of the amount due. The actual amount due for such items shall be determined by informal conference between the Company and the employee; in the event of continued disagreement, the final amount due will be determined pursuant to procedures approved by the Bankruptcy Court. The Company will also pay amounts due pursuant to the resolution of ALPA Grievance 12-83 and any other unpaid Grievance Arbitration Awards for monetary relief entered prior to September 24, 1983. In any event, payment for such claims will be in accord with the terms of the final Reorganization Plan to be approved by the Bankruptcy Court.

2. Waiver of Disputed Items and Release of All Other Legal Claims. Continental has disputed liability for all other items asserted as Bankruptcy Claims by individual employees and for all other legal claims threatened or asserted by individual employees. As a condition to participation in the recall by seniority order pursuant to Section I.B., individual striking pilots will be required (a) to waive and release all such disputed bankruptcy claims and all other legal claims of any nature against Continental, its employees (including officers and directors) and affiliates (including Texas Air Corporation) and their employees (including officers and directors); (b) to commit their remaining undisputed bankruptcy claims to a trustee to be named by the Company for voting purposes only with instructions to vote the claim in support of Continental's proposed Reorganization Plan; and (c) to agree to be subject to all terms and provisions of this Order and Award.

3. Treatment of Pilots Who Decline Waiver.

A striking pilot who declines to execute the waiver described in paragraph III. B. 2, supra, will retain his right to recall but will be recalled subsequent to the recall of waiving pilots and in the chronological order in which each such non-waiving pilot contact(ed) Continental to tender an unconditional offer to return to work. ALPA shall provide no support or assistance, direct or indirect, to any such non-waiving pilot in further pursuit of his bankruptcy claims, or any other claims against Continental, its employees (including officers and directors) or its affiliates and their employees (including officers and directors).

4. Minimum Level of Participation.

Continental shall have the right to abrogate this Order and Award in the event that less than 80% of the striking pilots eligible to elect options pursuant to this Order and Award fail to elect either (a) Recall with waiver of disputed claims, or (b) The Severance Pay Option and Claims Waiver, or (c) The Early Out Pass Privileges and Claims Waiver.

5. Remedies in Event of Future Job Actions.

In the event of any job action, slowdown, sick-out, withdrawal of enthusiasm, inordinate fuel burn, inordinate mechanical write-ups or any other improper concerted action by striking pilots who have returned to work, Continental shall have the right to seek an immediate hearing upon 24-hour notice (or such different notice as the Court may set) before Bankruptcy Court Judge Glover T. Roberts (or, if he is unavailable, before the Bankruptcy Court). The Court shall have jurisdiction to issue immediate injunctive relief and such other forms of relief, including damages, as the Court deems appropriate in the circumstances.

C. Other Bankruptcy Proceedings.

Except as otherwise provided herein, ALPA will not further participate in Bankruptcy Court proceedings relating to Continental or its affiliates; provided, however, that ALPA may be selected by an affected pilot to appear as his personal representative where a personal representative is permitted to participate in proceedings pursuant to this Order and Award.

ALPA will withdraw from further participation in the activities of the Official Union Labor and Pension Creditors Committee.

D. Pension Issues.

All pension issues are to be resolved as provided in Attachment C. All claims arising from the freezing, rejection, or termination of any pilot pension plan shall be treated as settled and dismissed with prejudice.

E. Other Claims and Litigation.

All pending litigation cases between ALPA, Continental (and its affiliates and their employees, officers and directors) (the "parties") will be treated as settled and dismissed with prejudice and all claims against such parties shall be waived with respect to the subject matter of the pending litigation being dismissed. Continental will also dismiss its claims against each individual pilot defendant in such litigation who elects an option under this Order and Award which includes resolution of all of his claims against Continental, its employees and affiliates in accord with Section II.C. or Section II.B.2. Continental shall provide no support or assistance, direct or indirect, to any individuals in further pursuit of the lawsuit entitled *Moore et. al v. ALPA*, Civil Action No. H-85-3608 (S.D. Tex.) (fines). other than payment of attorney fees and costs accrued for work performed to the date of this Order and Award which are approved by the Bankruptcy Court. ALPA will withdraw any and all claims and charges it has filed against Continental, its employees or affiliates with any Federal, State or Local government agency. (See Litigation Attachment #B.)

IV. Non-Recognition

This Order and Award shall not constitute express or implied recognition of ALPA by Continental as the prospective collective bargaining representative of Continental pilots, and shall not affect the right of any party to recourse before the National Mediation Board for such action as may be appropriate.

V. Dispute Resolution Procedure

Any disputes which may arise concerning the interpretation, or application of the terms of this Order and Award, other than cases which may arise pursuant to paragraph I.A.3. or I.B.8(b) of this Order and Award, may be submitted by the affected pilot in writing to the Company. If the dispute is not satisfactorily resolved within five (5) days, the affected pilot may submit the dispute forthwith to the Bankruptcy Court as an adversary proceeding.

Disputes which arise pursuant to Paragraphs I.A.3. or I.B.8.(b) of this Order and Award may likewise be submitted by the affected pilot in writing to the Company. If the dispute is not satisfactorily resolved within five (5) days, the affected pilot may submit the dispute forthwith to arbitration for final and binding decision. The case shall be heard and decided by one arbitrator to be selected by the alternate striking method from a panel of five (5) names (each of whom shall be a member of the National Academy of Arbitrators) to be provided by the American Arbitration Association upon request of the affected pilot. A coin toss shall be used to determine which party strikes first. The parties expressly agree to select the arbitrator within three (3) days of receipt of the panel provided by the American Arbitration Association. Said arbitration shall commence within forty-five (45) days of the selection of the arbitrator. Any resulting arbitration award shall be subject to enforcement or review in the Bankruptcy Court.

The affected pilot(s) may appear or participate in the dispute resolution process in the Bankruptcy Court or in arbitration by any personal representative of his choice.

The provisions of this Section do not apply to the interpretation or application of the Pilot Employment Policy, the Pilot Scheduling Manual or Company Policy, all of which remain beyond the jurisdiction of this procedure.

VI. Continuing Jurisdiction and Expiration Date.

The Bankruptcy Court shall retain jurisdiction, both pending plan confirmation, and post-confirmation, to enforce the terms of this Order and Award. The provisions of

this Order and Award shall expire no later than the date on which the last returning striker assumes a Captain position at Continental Airlines. Entered this 31st day of October, 1985, at Houston, Texas, pursuant to the procedural agreement of the parties on the record.

/s/

T. Glover Roberts
United States Bankruptcy Judge

LITIGATION ATTACHMENT

All pending Litigation to be dismissed with prejudice, including, but not limited to:

1. *Continental Airlines Corp., et al v. Air Line Pilots Association, et al.*, Br. Consolidated Case No. 83-04019-H2-5, Adversary Proceeding No. 83-2386-H3 (Bank. S.D. Tex.).

2. *Air Line Pilots Association v. Continental Air Lines, Inc.*, Civil Action No. H-83-6196 (S.D. Tex.); Adversary Proceeding No. 83-2455-H1.

3. *Continental Airlines Corp., et al v. Air Line Pilots Association, et al.*, Br. Consolidated Case 83-04019-H2-5, (Bankr. S.D. Tex.). ALPA to withdraw any and all motions and appeals, including:

1. Motion to dismiss
2. Motion to reject contract
3. CAL motion to pay pre-petition wages to non-returnees
4. CAL motion to terminate insurance benefits
5. CAL motion to implement stock ownership program
6. CAL motion to pay law firms representing disciplined employees

4. *Air Line Pilots Association v. Texas International Airlines, Inc.*, Civil Action No. H-81-2200 (S.D. Tex.); No. 83-2272 (5th Cir.). Vacate the District Court's judgment. ALPA to withdraw its grievance in the underlying controversy.

5. *Texas Air Corp. v. Air Line Pilots Association*, Civil Action No. H-84-530 (S.D. Tex), Adversary Proceeding No. 84-0228H1. ALPA to withdraw with prejudice its request for arbitration and waive all claims arising under the TAC-ALPA Side Letter.

6. *Continental Air Lines Corp., v. Air Line Pilots Association*, Adversary Proceeding No. 84-0617-H3, Bankr. S.D. Texas. (suit to enjoin TAC arbitration)

7. *Continental Airlines, Inc., v. Air Line Pilots Association, International*, California Superior Court, Los Angeles County No. C-470501.

8. In re New York Air, National Mediation Board File No. CR-5177.

9. *Air Line Pilots Association, International v. Continental Airlines, et. al.* Case No. 85-5203 (S.D. Tex.) All claims and counterclaims dismissed.

10. In re Air Line Pilots Association, No. 85-2650 (5th Cir.) (ALPA petition for mandamus).

11. *Air Line Pilots Association, International v. Continental Airlines Corporation et al.*, U.S.D.C. (S.D. Tex.) Civil Action H-85-5675.

12. *Continental Air Lines, Inc. v. ALPA*, Civil Action No. H-84-3069 (S.D. Tex.) (ALPA appeal from Order re mass disciplinary hearings).

13. *Continental Air Lines, Inc. v. ALPA*, Civil Action No. H-83-5979 (S.D. Tex) (TRO and attorneys fees).

14. *Air Line Pilots Association v. Continental Air Lines, Inc., et al.*, Civil Action No. H-84-1555 (S.D. Tex.) (pension plans).

15. *In re Continental Airlines Corp., et al.*, MBH No. 85-360 (S.D. Tex) (Motion for Stay).

16. Grievances. All pending grievances and/or arbitrations shall be treated as settled and dismissed with prejudice except for those grievances relating to terminations for cause which are subject to arbitration pursuant to Section I.A.3.

17. Pending litigation between ALPA and Continental in Great Britain shall be treated as settled and dismissed with prejudice provided that a mechanism for the enforceability of this Order is available.

18. Pending litigation in Australia shall be treated as settled and dismissed with prejudice provided adequate retractions are provided.

Attachment C
October 31, 1985

Terms For An Order On
Consent With Respect To
The Pilots' Pension Plans

A Plan

1. The Continental Air Lines, Inc. ("CAL") Fixed Pension Plan For Pilots (the "A Plan") be, and it hereby is, rejected and terminated effective immediately prior to the commencement of the Chapter 11 case on September 24, 1983, in accordance with the amendment to the CAL Plan dated March 9, 1984, to the extent not inconsistent with this Order.

2. Open Issue In order to effectuate the orderly winding up of the A Plan including an orderly distribution of the A Plan's assets as soon as possible, CAL shall continue to administer the A Plan and its assets for the purposes thereafter set forth and shall take the actions hereinafter provided to be taken, provided that CAL shall notice pilot participants and involve the Benefits Board in making decisions relating to the Plan.

3. CAL shall take all steps necessary to obtain from the the Internal Revenue Service ("IRS") a determination that the termination of the A Plan does not adversely affect the qualification of the Plan, the application for which has been submitted to the IRS by CAL.

4. The A Plan shall be deemed technically amended in a manner satisfactory to CAL and ALPA, to the extent not previously amended, providing for, among other things:

(a) Full vesting for each participant who did not have a severance of employment prior to September 24, 1983.

(b) In the event of the death of a participant prior to March 9, 1984, payment of the same death benefit as would have been payable under the A Plan prior to its amendment on March 9, 1984.

(c) Continuation of the A Plan's provisions concerning distributions on termination of employment, so that any participant who terminates before the date an annuity is purchased pursuant to paragraph "6" of this Order will receive his distribution (as vested under this Order) under such provisions, subject to any elections he may make pursuant to clause (d), below.

(d) An option for participants who have terminated employment to defer receipt of the distribution of the certificates under the annuity contract to be purchased pursuant to paragraph 6 and of benefits payable under the A Plan until the distribution of benefits under the Continental Air Lines, Inc. Variable Pension Plan for Pilots (the "B Plan").

(e) Automatic consent of CAL to early retirement for all participants upon reaching age 45, provided they have terminated employment.

(f) Technical compliance with the provisions for qualified plans under Section 401 of the Internal Revenue Code.

5. CAL shall provide the proper option forms to the Plan participants within 30 days of the date of the entry of this Order.

6. Open Issue Full distribution to Plan participants as a result of the termination of the A Plan shall be made by the purchase of an annuity contract, and distribution of individual certificates under the contract, pursuant to the September 11, 1985 proposal from Prudential Insurance Company of America or any similar proposal by an insurance company acceptable to CAL and the Benefits Board except that lump sum payments will be made for benefits with a present value of less than \$3,500 based on the 1984 Unisex Pension mortality table and PBGC interest rates used for valuing annuities under terminating plans as of the first day of the

calendar quarter preceding the date of distribution of the lump sums, except as otherwise may be required by the PBGC. The benefit payment options under the A Plan will be preserved under current terms and will be calculated using an 8% interest rate and the 1984 Unisex Pension mortality table. In addition, in the event of the death of a participant prior to the commencement of the payment of a retirement benefit under the annuity, the only death benefit payable (which shall be payable at no cost to the participant) shall be 50% survivor benefit payable (to the participant's spouse, if married, or beneficiary if not married or if the spouse waives the death benefit) on or after the date the participant would have attained age 45.

(i) if a participant is married assuming the participant retired on the day before his death and elected a joint and 50% survivor benefit, and

(ii) if a participant is not married, assuming the participant was married with a spouse two years younger than the participant, the participant retired on the day before his death and elected a joint and 50% survivor benefit.

7. Open Issue The Benefits Board will remain intact with pilot representation and the pilot members will have joint signatory authority with CAL over release of benefit payment statements until annuities are purchased and in effect.

8. Any reversion (excess assets after purchase of the aforementioned annuity contract) upon termination of the A Plan will be paid to CAL.

9. Additional amounts shall be distributed from the A Plan to any participant or beneficiary to whom a distribution has been made since September 24, 1983 on a less than fully vested basis, within 30 days after the date of entry of this Order in an amount equal to the difference between the distribution previously received and that which would have been received based upon the vesting provisions of this Order.

10. Upon entry of this Order, ALPA shall take such action as is appropriate to request a stay of that portion of *Air Line Pilots Association, International v. Continental Air Lines, Inc.*, Civ. Action No. H-84-1555, pending in the United States District Court for the Southern District of Texas, that relates to the A Plan, and upon the purchase of the annuity contract provided in paragraph "6" of this Order, ALPA shall take the appropriate steps to obtain the dismissal of such action that relates to the A Plan (with respect to all defendants in such action), all such action to be subject to the approval and direction of the United States District Court for the Southern District of Texas.

11. CAL shall be, and it hereby is, authorized and empowered to execute and deliver any documents, including, without limitation, the execution and delivery of documents memorializing and effectuating the provisions of paragraph "4" of this Order to the extent such provisions have not previously been made part of the A Plan and to take any further actions as may be necessary to effectuate the rejection and termination of the A Plan and the provisions of the Order as hereinabove provided.

12. In the event that distributions already made to participants who have terminated employment since the date of the Chapter 11 petition were calculated erroneously, giving such participants more than their proper share of the existing Plan funds, CAL or the Benefits Board shall have the right to seek further relief to insure equitable treatment of all Plan participants.

13. In the event a participant in the A Plan dies between March 9, 1984 and the first date benefits are paid out to any participant under the annuity contract referred to in paragraph 6 above, CAL shall pay to the participant's beneficiary an amount equal to the difference between the death benefit payable under the A Plan prior to amendment on March 9, 1984 and the death benefit payable under the Plan as so amended.

14. The terms of the Plan shall not be further amended without the consent of ALPA, except as provided by this Order or as is necessary to retain its qualified status.

TXI Plan

1. The Texas International Airlines, Inc. Fixed Pension Plan for Pilots ("TXI Plan") be and it is rejected effective immediately prior to the commencement of the Chapter 11 case on September 24, 1983, provided that the TXI Plan shall not be terminated but shall be considered frozen effective as of September 24, 1983, as provided in an amendment of the TXI Plan dated March 9, 1984, to the extent not inconsistent with this Order.

2. CAL shall continue to administer the TXI Plan and its assets for the purposes hereafter set forth and shall take the actions hereafter provided to be taken, provided that CAL shall continue to comply with the terms of the Plan providing for notice to ALPA and the involvement of ALPA in making decisions relating to the Plan.

3. The TXI Plan shall be deemed technically amended in a manner satisfactory to CAL and to ALPA, to the extent not previously amended, providing for, among other things:

(a) Full vesting, for all participants who did not have a severance of employment prior to September 24, 1983, of all benefits accrued as of that date.

(b) Participants who were 40 years of age or older on September 24, 1983 will be eligible for subsidized early retirement benefits (using a 3% reduction in benefits for each year of benefit payments prior to age 60) upon termination of employment. Participants under 40 years of age on September 24, 1983 will be eligible for early retirement benefits upon termination of employment at age 42 (using a reduction in benefits for each year of benefits prior to age 60, based on an 8.5% per annum interest rate and the 1985 Group Annuity table). No benefit shall commence prior to the first day of the second month following the entry of the Order.

(c) Upon the death of any participant prior to March 9, 1984, the same death benefit shall be paid as would have been payable under the TXI Plan prior to its amendment on March 9, 1984.

4. The Plan shall not be amended, except as provided by this Order or as is necessary to retain its qualified status, without the consent of ALPA.

5. CAL may, at its option, provide for any benefits due under this Order, with regard to the participants in the TXI Plan, through a separate tax qualified plan which would be subject to the approval of ALPA.

6. Additional amounts shall be distributed from the Plan to any participant or beneficiary to whom a distribution has been made since September 24, 1983 on a less than fully vested basis, within 30 days after the date of entry of this Order in an amount equal to the difference between the distribution previously received and that which would have been received based upon the vesting provisions of the Order.

7. Open Issue. The Pension Committee will remain intact with pilot representation, and the Pension Committee will have joint signatory authority with Continental over release of benefit payment statements.

8. CAL shall fund the TXI Plan, and any alternate plan established pursuant to paragraph 6 of this Order, at a level not less than level annual payments that will fully amortize the cost of all benefits no later than December 31, 1995, using an assumed 11% interest rate and the 1985 Group Annuity table.

APR 23 1990

JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1493

**In The
Supreme Court of the United States**

October Term, 1989

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
Petitioner,

v.

JOSEPH E. O'NEILL, ET AL.,
Respondents.

*On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit*

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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April 23, 1990

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for the Fifth Circuit**

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**COUNTERSTATEMENT OF
QUESTIONS PRESENTED**

This is a fair representation dispute between striking pilots and their union. The questions presented are as follows:

1. Whether review by this Court of an order remanding a summary judgment case for trial is premature.
2. Whether the duty of fair representation precludes arbitrary actions by a union in negotiating a strike settlement and, if so, whether there is sufficient factual showing of arbitrary conduct here to warrant trial.
3. Whether the criteria applied by the Fifth Circuit conflict with any decisions of this Court or any Circuit.

ADDITIONAL PARTIES

In addition to the named plaintiffs listed on page ii of the petition, Respondents (hereinafter the "O'Neill Group" or the "pilots") comprise a certified class of approximately 1,400 past or present Continental Air Lines ("Continental") pilots who withdrew their services from Continental at any time from October 1, 1983 through October 31, 1985, in connection with a strike called by their union, the Air Line Pilots Association, International ("ALPA"), and who were not working for Continental on October 31, 1985, the date the strike ended.

COUNTERSTATEMENT OF THE CASE

Brief Procedural History.

This dispute arises out of a secret strike settlement reached by ALPA with Continental. In its amended complaint, the O'Neill Group sought recovery on four counts. Count One alleged a breach of the duty of fair representation which ALPA and various ALPA officers owed the pilots under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* Count Two alleged a violation of the voting rights of the pilots guaranteed under Section 101(a)(1) of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411. The O'Neill Group also asserted two additional claims.

The discovery was extensive and the record was complex, comprising in excess of 6,000 pages. In August 1987, ALPA moved for judgment on the pleadings and for summary judgment on all counts. The O'Neill Group's response included five volumes of affidavits and other exhibits. Immediately following oral argument in November 1987, the trial court granted ALPA's summary judgment motion and dismissed the O'Neill Group's suit. The only explanation for the ruling were some remarks from the bench.

The O'Neill Group appealed the summary judgment as to the duty of fair representation and LMRDA claims and, on October 31, 1989, the Fifth Circuit issued its opinion affirming as to the LMRDA claim but reversing and finding disputed issues of fact as to the duty of fair representation claim. ALPA's request for a rehearing and for a rehearing en

banc was rejected by the Fifth Circuit in an order dated December 27, 1989.

ALPA's Agreement To The Secret Strike Settlement.

ALPA has omitted critical facts from its statement of the case and stated items as "fact" when they are heavily disputed. We emphasize here some points that were important to the Fifth Circuit's ruling.

The focus of this case is a secret strike settlement that ALPA representatives reached with Continental in October of 1985 and maneuvered to have entered as a bankruptcy court "order and award" on October 31, 1985 (R 149).¹ The secret strike settlement altered the seniority bidding system Continental used before and during the strike. Under this system any pilot interested in a pilot position could bid for his preferred position by status (i.e., captain, first officer, second officer), base (city), and equipment type (R 163, Att. 9). Continental then allocated vacant pilot positions solely according to seniority, determined by the date a pilot first flew for Continental (*id.*).

ALPA's secret strike settlement altered the seniority system beginning with Continental's "85-5 bid." The 85-5 bid was a posting in September 1985 of over 440 pilot vacancies that would be available in 1986 (R 149, Ex. 80; R 163, Att. 8). Continental "awarded" the 85-5 bid positions to pilots who worked during the strike (the "nonstrikers") but the positions were still vacant when the strike ended on October 31, 1985.² ALPA nonetheless agreed with Continental to give the non-strikers "superseniority" preferences for the 170 captain posi-

¹ "R" references are to the record in the district court, as identified by that court's docket sheet. The secret strike settlement agreement (the "order and award") is No. R 149, and a copy is appended to ALPA's petition as Appendix 4.

² ALPA mischaracterizes the decision below as holding that strikers could "displace" permanent replacements from the positions awarded under the 85-5 bid (pet., p. 9). The record was uncontroverted that the positions had not been filled by nonstrikers before the strike ended.

tions in the 85-5 bid and the captain positions that became available in subsequent bids after the strike.³

The settlement gave the first 100 captain positions in the 85-5 bid to nonstrikers, even though they were far less senior than the returning strikers many of whom were captains before the strike, and the remaining 70 to returning strikers who agreed to waive bankruptcy claims against Continental⁴ (R 149, Ex. 39). It also gave the nonstrikers half of Continental's post-strike captain positions under a 1:1 ratio that required one nonstriker to become a captain for every striker who advanced to captain after the strike, despite the nonstriker's lower seniority (*id.*). In both cases the settlement permitted nonstrikers to bid for the captain positions of their choice and Continental assigned the returning strikers to only the positions not picked by the nonstrikers (*id.*).

The Long-Term Effects Of The Secret Strike Settlement.

The secret strike settlement was a major change in Continental's seniority bidding system. In one illustrative case, the settlement allowed a nonstriker to become a captain ahead

³ Superseniority is a term of art that refers to granting seniority-based benefits on some criteria other than seniority to employees whose seniority would not otherwise entitle them to those benefits. In *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 235 (1963), this Court held that superseniority preferences based upon nonparticipation in concerted activity is "inherently discriminatory" and, therefore, unlawful. See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967) (strikers are entitled to nondiscriminatory reinstatement as vacancies become available after a strike).

⁴ Returning strikers who refused to waive claims as a condition of recall were put at the end of the recall list, regardless of their overall seniority, the dates they offered to return to work or any other objective factor (R 149, Ex. 39). It is unlawful to require strikers to waive such rights as a condition of recall after a strike. *American Cyanamid Co. v. NLRB*, 592 F.2d 356 (7th Cir. 1979).

of a returning striker who was a captain before the strike and had 19 years more seniority⁵ (R 163, Att. 13).

ALPA negotiator Kirby Schnell summed up the effect of these provisions in notes he made during the last couple days of negotiations. In Schnell's words, the settlement "bastardized [seniority] beyond all recognition" and "f—ked my people forever" (R 163, Att. 7.5). In other notes Schnell described the 1:1 ratio as follows:

1:1 forever busts sen[iority]. Deal so far already violated that concept—I've already killed myself on that issue. To go further bastardizes the sen[iority] concept forever.

(R 149, Ex. 1.1). Indeed, the settlement was so bad that an unconditional offer to return to work would have been better for the striking pilots.⁶ ALPA therefore insisted on submitting the settlement to the bankruptcy court rather than having ALPA's president sign his name to it and present it to the pilots for ratification⁷ (R 149, Exs. 9, 10; R 163, Att. 4). ALPA

⁵ This is nearly identical to the preference the Court struck down in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963) (unlawful for employer to give nonstrikers a 20-year seniority preference in post-strike advancement).

⁶ The record below showed that Continental maintained its seniority bidding procedure throughout the strike and allowed crossovers to bid their full pre-strike seniority while still on the preferential recall list awaiting recall. Continental had previously returned striking flight attendants and machinists to work in seniority order to available positions when their unions made unconditional offers to return to work (R 163, Att. 5.5). ALPA's outside lawyers advised ALPA that Continental would be required to fill vacancies with returning strikers (R 163, Att. 5.5), just as United was required to do in litigation concluded two months earlier. See *ALPA v. United Air Lines, Inc.*, 614 F.2d 1020 (N.D. Ill. 1985), *aff'd in relevant part*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987). Additionally, Continental told ALPA in September 1985 that it would reinstate strikers with full seniority under an unconditional offer to return (R 163, Att. 1).

⁷ There was uncontroverted evidence that ALPA promised the pilots they would be permitted to ratify any strike settlement with Continental (R 149, Exs. 47, 56, 67; R 163, Att. 5.1), as the Fifth Circuit noted in its opinion. See 886 F.2d at 1448. The pilots and the Continental Master Executive Council, however, never heard about the settlement until after it had been entered by the bankruptcy court.

has consistently blamed the bankruptcy judge for the settlement terms (R 149, Exs. 15, 16).

These changes were not simply a "temporary transition" as ALPA asserts (pet., p. 10 n.6). Under the secret strike settlement, as well as under Continental's prior bidding system, bidding is for future vacancies, not present positions. Thus, a less senior nonstriker who obtains a captain position under the settlement cannot be displaced in later bids by even the most senior pilot.⁸ As Mr. Schnell's notes reflect, these changes last "forever" (R 163, Att. 7.5; R 149, Ex. 1.1).

Decision Of The Fifth Circuit Court Of Appeals.

Upon review of the circumstances surrounding the secret strike settlement and the long-term effects it will have on the seniority system by favoring nonstrikers over strikers, the Fifth Circuit held that summary judgment on the pilots' duty of fair representation claim was wrong for at least two reasons. First, the Fifth Circuit concluded that a fact-finder could find that had ALPA simply agreed to an unconditional return to work, the pilots would have been able to retain both their seniority and their litigation rights against Continental. *O'Neill v. ALPA*, 886 F.2d 1438, 1446 (5th Cir. 1989). To enter into a secret strike settlement that was worse than an unconditional offer to return to work, the Fifth Circuit reasoned, would be arbitrary and irrational and, thus, a breach of the duty of fair representation. 886 F.2d at 1444.

Second, the Fifth Circuit found that a secret strike settlement that expressly favors nonstrikers over strikers is evidence that the union intentionally discriminated against the striking pilots. 886 F.2d at 1447. Although ALPA contended that the secret strike settlement was the only option open to it, the Fifth Circuit properly found that the record contained facts supporting the pilots on that question.

⁸ Some "bumping" can take place in a reduction in force, but that has not occurred. Certain equipment freezes and other aspects of the bidding system not important here also operate to lock pilots into their positions and make the settlement provisions more than temporary (R 149, Ex. 103).

REASONS FOR DENYING THE WRIT

I. This Court Should Not Issue A Writ Of Certiorari To Review The Interlocutory Decision Of The Fifth Circuit Court Of Appeals Because The Ultimate Outcome Of This Case Is Not Known.

A determinative fact in this Court's decision whether to grant ALPA's petition is that no final judgment exists in this case. The Fifth Circuit merely found that there were disputed issues precluding entry of summary judgment against the pilots and remanded to the district court for further proceedings. The lack of finality is "of itself alone" grounds for denial of ALPA's petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). See *Brotherhood of Locomotive Firemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 328 (1967) (denying certiorari because the Court of Appeals remanded the case and thus it was not yet ripe for review).

In the few instances where this Court has taken review of interlocutory orders, it has done so only on extraordinary grounds, such as reversing an improvident and unusual exercise of jurisdiction, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52 (1938), or compelling the court of appeals to issue a writ of mandamus requiring the district court to hold a jury trial. *Beacon Theatres v. Westover*, 359 U.S. 500 (1959).

No extraordinary circumstances are presented here. Depending on the facts to be developed at trial, ALPA can be found guilty of discriminatory conduct toward the pilots. If the trial court makes such a finding, there will be no need to decide the issue ALPA now presents, which is whether ALPA's arbitrary conduct breached the duty of fair representation. Thus, any review by this Court must await the outcome of the proceedings on remand and ALPA's current petition must be denied.

II. This Court's Recent Decision In *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry* Resolves Any Question Over The Applicable Standard.

The first issue ALPA raises in its petition is whether the standard articulated in *Vaca v. Sipes*, 386 U.S. 171 (1967) (hereinafter *Vaca*), applies to union conduct in negotiating an agreement. This Court's recent decision in *Chauffeurs, Teamsters & Helpers, Local 391 v. Terry*, 58 U.S.L.W. 4345 (March 20, 1990) (hereinafter *Terry*), makes clear that the *Vaca* standard applies squarely to union conduct in negotiations.⁹ *Vaca* is not limited, as ALPA asserts, to union conduct in administering a collective bargaining agreement.

The duty [of fair representation] requires a union "to serve the interests of all members [in a bargaining unit] without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." A union must discharge its duty both in bargaining with the employer and in its enforcement of the resulting collective bargaining agreement.

⁹ ALPA also construes *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), too narrowly. There the Court affirmed a district court decision finding that the seniority system at issue was not "'arbitrary, discriminatory or in any respect unlawful.'" 345 U.S. at 333 (quoting the district court). The Court held that a union is empowered to make concessions "in the light of all relevant considerations." *Id.* at 338. This is the same "arbitrary" standard articulated later in *Vaca*, 386 U.S. at 177, followed by the Fifth Circuit in *Tedford v. Peabody Coal Co.*, 533 F.2d 952, 957 (5th Cir. 1976), and in the decision below.

58 U.S.L.W. at 4346, quoting *Vaca*, 386 U.S. at 177.¹⁰

Terry vitiates any possible dispute as to whether the Fifth Circuit applied the proper legal standard and moots any perceived need to review this case to reconcile decisions in other circuits.

III. There Is No Split Among The Circuits On The Legal Standard Applicable To The Union's Conduct In This Case.

ALPA overstates the conflict among the circuits that existed prior to *Terry*. Cases in both the Seventh and Ninth Circuits apply *Vaca* in the negotiating context. See *Bernard v. ALPA*, 873 F.2d 213 (9th Cir. 1989);¹¹ *Hendricks v. ALPA*, 696 F.2d 673, 677 (9th Cir. 1983) (recognizing that arbitrary union conduct in negotiations breaches the duty of fair representation); *Alvey v. General Electric Co.*, 622 F.2d 1279, 1289 (7th Cir. 1980) (relying upon the Fifth Circuit's decision in

¹⁰ *Terry* follows other recent decisions of this Court that adhere to *Vaca* as the proper duty of fair representation standard. See *Breining v. Sheet Metal Workers Int'l*, 110 S. Ct. 424, 429 (1989) ("We have long recognized that a labor organization has a statutory duty of fair representation . . . 'to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct'"), quoting *Vaca*, 386 U.S. at 177; *Communications Workers of America v. Beck*, 108 S. Ct. 2641, 2645 (1988); *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562, 575-76 n.20 (1982) ("in the collective bargaining process, the union must fairly represent the interests of all employees in the unit," citing *Vaca*, 386 U.S. at 177). In *Breining* the Court rejected the union's argument that the duty of fair representation is analogous to 29 U.S.C. § 158(b) (proscribing intentional union discrimination), which is much like the standard ALPA argues for here. The Court held squarely that the duty of fair representation goes further "'to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.'" 110 S. Ct. at 436, quoting *Vaca*, 386 U.S. at 182.

¹¹ In *Bernard* the Ninth Circuit affirmed summary judgment against ALPA for violating its duty of fair representation by discriminating against former Jet America pilots in negotiations over a seniority integration agreement with Alaska Air. 873 F.2d at 218. The same result can be reached on this record.

Tedford v. Peabody Coal Co., 533 F.2d at 957); *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 799 (7th Cir. 1976) ("arbitrary conduct without evidence of bad faith has been held by this Circuit to constitute a breach of the duty").¹²

In the Eleventh Circuit, *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), cert. denied, 109 S. Ct. 2066 (1989), the case ALPA cites as in conflict with the Fifth Circuit, holds squarely that arbitrary conduct in negotiations violates the duty of fair representation:

A violation of the Union's duty of fair representation in the context of negotiations with the Company is established if the Union's conduct in negotiations is arbitrary, irrational, or undertaken in bad faith.

Id. at 1520. *Parker* also recognizes, as did the court below, that union misconduct in the ratification of an agreement violates the duty of fair representation. *Id.* at 1521.

IV. There Is No Conflict Between The Ruling Below And This Court's Decision In *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*.

ALPA erroneously asserts that the decision below is contrary to this Court's decision in *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 109 S. Ct. 1225 (1989) (hereinafter *TWA*). First, the court below cited the

¹² In *Barton Brands*, the Seventh Circuit held that the union would be found in violation of its duty of fair representation for abridging the long-established seniority rights of a minority of employees unless, on remand, it showed "some objective justification for its conduct." 529 F.2d at 800. This holding accords squarely with the decision below and with the Fifth Circuit's prior decision in *Tedford*, 533 F.2d at 957. *Thomas v. United Parcel Service, Inc.*, 890 F.2d 909 (7th Cir. 1989), the Seventh Circuit case cited by ALPA in conflict with the decision below, was a grievance case and did not overrule *Barton Brands*. Moreover, in *Thomas*, the court recognized a difference between it and other circuits but reconciled the difference when it held that the "arbitrary, discriminatory, or in bad faith" standard of *Vaca* applies generally, although a union may be given greater deference in matters of judgment, such as negotiations. 890 F.2d at 922.

Eighth Circuit's decision in *TWA* for the point that pilot positions that were not yet occupied at the end of the strike were vacancies to which strikers were entitled to return. *Independent Federation of Flight Attendants v. Trans World Airlines, Inc.*, 819 F.2d 839 (8th Cir. 1987) (trainees who had not yet served in positions were not permanent replacements and returning strikers were entitled to those positions). Accord *ALPA v. United Air Lines, Inc.*, 614 F. Supp. 1020 (N.D. Ill. 1985), aff'd in relevant part, 802 F.2d 886 (7th Cir. 1986), cert. denied, 480 U.S. 946 (1987). This Court did not grant certiorari on this "vacancy" point. *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 108 S. Ct. 1219 (1988) (certiorari granted only to consider displacement of crossovers).

Second, the record was uncontroverted that all of the 85-5 bid positions were still vacant when the strike ended on October 31, 1985; there was no evidence that the nonstrikers had even begun training for those positions by that date. The Fifth Circuit's determination that unfilled positions are vacancies available to returning strikers does not conflict with this Court's *TWA* decision. 109 S. Ct. at 1232 ("positions occupied by newly hired replacements . . . are simply not 'available positions' to be filled" by returning strikers) (emphasis added).

V. The Fifth Circuit Correctly Concluded That ALPA's Conduct Could Be Found Violative Of Its Duty Of Fair Representation.

The facts in this record and the controlling case law compel the conclusion that the Fifth Circuit correctly held that ALPA's conduct in secretly settling this strike on terms that discriminated between striking pilots and nonstriking pilots could be found violative of the union's duty of fair representation. It is beyond dispute that superseniority preferences of the type embraced in the secret strike settlement are unlawful. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); *Great Lakes Carbon Corp. v. NLRB*, 360 F.2d 19, 22 (4th Cir. 1966) (superseniority plan favoring employees who worked during a strike is unlawful on its face).

A union breaches its duty of fair representation when its conduct is antithetical to the statute that authorizes the union's existence and charges it with furthering the statute's goals.¹³ Courts have had no difficulty in finding that unions have breached their duty of fair representation for conduct just like ALPA's conduct here.¹⁴

Furthermore, the Fifth Circuit correctly discerned that the union in this case entered into a strike settlement agreement that is worse for the pilots who were on strike than an unconditional offer to return to work, with no explanation beyond argument of counsel. This is enough for the fact-finder to find that ALPA acted arbitrarily and irrationally. See *Tedford v. Peabody Coal Co.*, 533 F.2d 952 (5th Cir. 1976); *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793 (7th Cir. 1976). See also *Ford Motor Co. v. Huffman*, 345 U.S. at 338 (union must act "in the light of all relevant considerations").

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

¹³ See *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982) ("The terms of any collective-bargaining agreement must comply with federal laws Obviously, an agreement must also be substantively consistent with the National Labor Relations Act."); *Scofield v. NLRB*, 394 U.S. 423, 430 (1969) (union may not choose a position which interferes with a "policy Congress has imbedded in the labor laws").

¹⁴ *Bernard v. ALPA*, 873 F.2d 213 (9th Cir. 1989) (granting summary judgment against ALPA for discrimination against former Jet America pilots in a seniority integration agreement); *Bauman v. Tennessee Valley Authority*, 744 F.2d 1207 (6th Cir. 1984), cert. denied, 470 U.S. 1084 (1985) (union's agreement to seniority provisions which discriminated on basis of concerted activity breached its duty of fair representation); *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 797 (2d Cir. 1974) ("Discrimination in seniority based on nothing else but union membership is arbitrary and invidious and violates the union's duty to represent fairly all members of the bargaining unit."); *Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252, 282 (N.D. Ind. 1977) (granting summary judgment against union on female employees' fair representation claim where union negotiated a contract discriminating against them).

RESPECTFULLY SUBMITTED.

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No. 89-1493



In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Petitioner,

—against—

JOSEPH E. O'NEILL, et al.,

Respondents.

On Writ of Certiorari To The
United States Court of Appeals For The Fifth Circuit

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In The
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OCTOBER TERM, 1989

No. 89-1493

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Petitioner,

-against-

JOSEPH E. O'NEILL, *et al.*,

Respondents.

Reply Memorandum on Petition for Writ of Certiorari To The
United States Court of Appeals For The Fifth Circuit

Petitioner, Air Line Pilots Association International ("ALPA"), respectfully submits this reply memorandum in support of its request that writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit in *O'Neill, et al. v. Air Line Pilots Ass'n Intl.*, Fifth Cir. No. 88-2848 (Oct. 31, 1989).

Respondents' opposition brief presents five arguments why this Court should refuse to issue writ of certiorari. Only the first two points, both of which are arguments first raised in the brief in opposition, require any response.

First, relying on cases decided long before this Court's summary judgment trilogy announced in 1986, respondents argue that this Court should not issue a writ of certiorari because the Fifth Circuit's decision is interlocutory. Opposition Brief at 7. However, the legal questions presented by this litigation are precisely the type of controlling issues which are both "fundamental to the further conduct of the case" and of paramount public policy concern that warrant interlocutory review by this Court. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964). In this case, if the Fifth Circuit had reviewed the district court's decision to grant defendant summary judgment under the standard urged in the Petition, summary judgment would have been affirmed. Since the issue presented here is what standard should be applied, this legal question in a summary judgment context, together with the public policy concerns set forth in the Petition, presents the appropriate circumstance for interlocutory review.¹

Furthermore, respondents' argument that the issues presented by the Petition need not be decided, and will never have to be decided, if ALPA is "found guilty of discriminatory conduct" at trial is simply wrong. Opposition Brief at 7. The legal question of whether the Fifth Circuit's finding of possible discrimination conflicts with this Court's holdings in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), and *Trans World Airlines, Inc. v. Indep. Federation of Flight Attendants*, 109 S. Ct. 1225 (1989), is squarely presented in the Petition and justifies the granting of certiorari rather than remand for trial. Only if the different treatment of the pilots found in the order and

award (even if "intentionally" agreed to by the union) was the result of bad faith or hostility to some members of the unit, *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-338 (1953), or is inherently unlawful such as race discrimination, *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944), will a union's negotiating decision breach its duty of fair representation. Petition at 20. In all events, whether the allegations are of "discriminatory" or "arbitrary" conduct, this Court needs to articulate the appropriate standard under which the trier of fact must consider those allegations in a case involving union negotiating decisions.

Second, respondents argue that this Court's very recent decision in *Chauffeurs, Teamsters & Helpers Local 391 v. Terry*, 58 U.S.L.W. 4345 (1990), finally resolved the proper standard to be applied in all duty of fair representation cases. Opposition Brief at 8-9. In *Terry*, a case based on allegedly mishandled grievances, the Court determined that there is a right to a jury trial in a duty of fair representation action. The Court did not set forth what standard should be applied at trial to determine whether that duty was breached, nor was that question even presented or briefed. The Court merely recognized that the union's duty exists both in connection with bargaining with the employer and in connection with the pursuit of employee grievances. This Court did not hold in *Terry* that the standard set forth in *Vaca v. Sipes*, 386 U.S. 171 (1967), rather than the standard set forth in *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), applies in a breach of the duty of fair representation case challenging a union's bargaining decisions. In fact, by determining that duty of fair representation plaintiffs have a right to a jury trial, the Court actually strengthened the need to define the proper standard to be applied by the lower courts in instructing juries and, as here, deciding whether there is any genuine issue of material fact to be presented to a jury.

1. In any event, none of the limitations on interlocutory review have any effect on the Fifth Circuit's direct conflict with decisions of this Court, as set forth in the Petition.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, petitioner respectfully prays that the Court issue writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit.

Dated: April 26, 1990

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In the Supreme Court of the United States

OCTOBER TERM, 1990

AIR LINE PILOTS ASSOCIATION INTERNATIONAL, PETITIONER

v.

JOSEPH E. O'NEILL, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether petitioner breached its duty of fair representation by negotiating a back-to-work agreement that ended a strike by pilots against Continental Air Lines and allocated positions between returning strikers and pilots who worked during the strike.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1493

AIR LINE PILOTS ASSOCIATION INTERNATIONAL, PETITIONER

v.

JOSEPH E. O'NEILL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Since the 1940s, petitioner has represented Continental Air Lines pilots in collective bargaining with the airline. In 1983, after filing a petition under Chapter 11 of the Bankruptcy Code, Continental repudiated its collective bargaining agreements with petitioner and other employee unions and unilaterally imposed "emergency work rules" that cut pilots' salaries by more than fifty percent. In response, petitioner initiated a strike against Continental. Pet. App. B2.¹

¹ There are four separately paginated appendices to the petition, numbered 1 through 4. To simplify citations, we will cite to them as though they had been denominated A through D.

For the next two years, Continental employed permanent replacements and cross-over strikers as pilots. During that period, the bankruptcy court upheld the airline's rejection of its collective bargaining agreement with petitioner and ordered the parties to engage in collective bargaining. No new agreement was reached, and, by August 1985, working pilots outnumbered strikers by 1,600 to 1,000. At that point, Continental gave notice that it would no longer recognize petitioner as the pilots' bargaining representative. Pet. App. B2-B3.

On September 9, 1985, Continental posted its Supplementary Base Vacancy Bid 1985-5 (85-5 bid) covering some 441 anticipated vacancies for captains and first officers and an undetermined number of second officer vacancies. Pilots interested in those vacancies were invited to submit bids by September 18 specifying their preferred position, base of operations, and aircraft. Vacancies were then to be awarded on the basis of seniority. In order to allow for necessary training, the 85-5 bid was posted substantially in advance of the date when pilots were expected actually to assume the positions covered by the bid. After the date for submitting bids had passed, Continental "awarded" the positions covered by the 85-5 bid to working pilots. Pet. App. B3-B4; see Pet. 4; Br. in Opp. 3.²

In late September 1985, the Continental Master Executive Council (MEC)—a committee that served, subject to the authority of petitioner's executive board and board of directors, as the coordinating council for Continental pilots—voted not to return to work, but also authorized its officers and a negotiator to pursue a settlement with Continental. Pet. App. B4. See Pet. C.A. Br. 8; Resp. C.A. Br. 9. During October 1985, representatives of petitioner and Continental agreed to terms for the termination of the strike and the resolution of litigation involving Continental, petitioner, and individual pilots. On October 31, 1985, the bankruptcy court entered an order and award embodying the

² Bids for 85-5 positions were submitted not only by working pilots, but also by some strikers. Continental initiated litigation to invalidate the strikers' bids. See Pet. App. B3-B4.

parties' agreement. Pet. App. D.³ Petitioner consented to the entry of the order and award without providing notice to the striking pilots or the MEC or submitting the agreement for ratification. Pet. App. B4.

Under the order and award, each striker was entitled to select one of three options. Strikers electing Option 1, the most important for present purposes, waived claims against Continental and obtained the right to be reinstated, based upon seniority, in certain positions. The agreement allocated the first 100 captain positions in the 85-5 bid to working pilots. The next 70 captain positions (the remainder covered by the 85-5 bid) were earmarked for returning strikers; however, unlike working pilots, strikers were obligated to accept the base and aircraft type assigned by Continental. The agreement further provided that until October 1, 1988, subsequent vacancies for captain positions would be allocated between working pilots and returning strikers on a one-to-one ratio. Again, whereas working pilots could bid for the base and aircraft type they preferred, returning strikers were required to accept management's choice of base and aircraft.⁴ The issue of how vacancies occurring after October 1, 1988, were to be allocated among working pilots and returning strikers was submitted to binding arbitration. *Id.* at B4-B5, D6-D8.⁵

The effect of these provisions was to allocate to returning strikers some of the 85-5 bid positions that, according to Con-

³ There has been a dispute between the parties as to whether the bankruptcy court's approval of the order and award is relevant to the merits of respondents' fair representation claim. See Pet. App. B11. The court of appeals found that petitioner and Continental had agreed to the material terms of the order, and the court analyzed it as the equivalent of a negotiated agreement. *Ibid.* Petitioner has not sought further review of that determination.

⁴ We are advised that Continental abandoned its right to assign returning strikers to positions of its choice in the Fall of 1987. See Motion to Intervene for Limited Purpose and Pet. for Reh'g of Continental Airlines, Inc. at 7.

⁵ Under Option 2, pilots waiving claims against Continental received specified severance payments. Pilots choosing Option 3 retained their claims against Continental, but were to be reinstated—based upon the chronological order of their offers to return—only after all pilots choosing Option 1 had been reinstated. Pet. App. B4-B6.

tinental, had been awarded to working pilots. At the same time, the agreement guaranteed working pilots more desirable positions than they could have attained if all 85-5 bid positions and subsequent vacancies had been assigned to working pilots and returning strikers on the basis of seniority alone. It was foreseeable that the effects of placing working pilots in those positions would persist, since (in the absence of a layoff) pilots could not be displaced from positions they occupied. See Pet. App. B5.⁶

2. Respondents have been certified as representatives of a class of pilots who remained off the job until the end of the strike. In their complaint, respondents alleged that petitioner breached its duty of fair representation in negotiating and consenting to the order and award. The complaint also asserted that petitioner's failure to submit the agreement for ratification was a violation of Section 101(a) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 411(a)(1), and advanced two additional causes of action. The district court granted summary judgment in petitioner's favor on all claims. See Pet. App. C.

3. The court of appeals reversed with respect to respondents' fair representation claim. Quoting from this Court's decision in *Vaca v. Sipes*, 386 U.S. 171, 177, 190 (1967), the panel stated that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Pet. App. B9. Because *Vaca* "recognizes three distinct standards of conduct," the court continued, "a breach of the duty of fair representation does not require that a union's conduct be taken in bad faith or with hostile discrimination, but may rest upon the arbitrariness or irrationality of the union's acts." *Id.* at B9-B10. Adhering to standards it had announced in *Tedford v. Peabody Coal Co.*, 533 F.2d 952, 957 (5th Cir. 1976), the court stated that a union's decision could be considered arbitrary unless it was

(1) based upon relevant, permissible union factors which exclude[] the possibility of it being based upon motivations

⁶ With respect to matters other than their initial placement, returning strikers were entitled to exercise their seniority upon being recalled to work. See Pet. App. D9.

such as personal animosity or political favoritism; (2) a *rational result of the consideration of these factors*; and (3) inclusive of a fair and impartial consideration of the interests of all employees.

Pet. App. B10.

In this case, the court determined, a jury could find that petitioner had acted arbitrarily by agreeing to an order and award that "left the striking pilots worse off in a number of respects than complete surrender to [Continental]." Pet. App. B11. The court explained that returning strikers would have been legally "entitled to reinstatement as vacancies occurred" (*id.* at B12), that Continental "could not have changed its policy of assigning work by seniority * * * unless it had a legitimate and substantial business justification for doing so" (*id.* at B13), and that a trier of fact could find that Continental "likely would have recognized the returning strikers' seniority rights and privileges if they had unconditionally agreed to return to work" (*id.* at B14). The court rejected petitioner's contention that the agreement benefitted returning strikers by giving them access to some of the positions encompassed by the 85-5 bid, ruling that, "under ordinary seniority rules," returning strikers would have been "entitled to fill the vacancies announced in the 85-5 bid." *Ibid.*⁷ The court concluded (*ibid.*):

A factfinder could infer that had [petitioner] unconditionally offered to return the pilots to work, the strikers would have been recalled in seniority order, and would have been able successfully to bid for [85-5 bid] vacancies and also preserve their litigation rights against [Continental].

⁷ In support of this conclusion, the court cited *ALPA v. United Air Lines, Inc.*, 614 F. Supp. 1020 (N.D. Ill. 1985), *aff'd in part*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987). The district court's decision in *United Air Lines* was entered on August 8, 1985, and that case was pending on appeal at the time petitioner agreed to the entry of the order and award in the bankruptcy court. The court of appeals also included a "see also" citation to *Independent Fed. of Flight Attendants (IFFA) v. Trans World Airlines, Inc.*, 819 F.2d 839 (8th Cir. 1987), *rev'd in part*, 109 S. Ct. 1225 (1989). The *IFFA* decision was issued after the entry of the order and award.

In addition, the court of appeals held that respondents had raised a material issue of fact as to whether the order and award unjustifiably discriminated against returning strikers. "Depending upon the explanation offered by [petitioner]," the court concluded, "a factfinder might infer that the negotiated division of pilots into strikers and nonstrikers and the subsequent unfavorable discriminatory treatment of returning strikers constituted a breach of the union's duty of fair representation." Pet. App. B15.⁸

DISCUSSION

The courts of appeals have taken varying positions on the question whether fair representation claims are subject to different legal standards depending on whether they arise from a union's actions in contract negotiations or in contract administration. In our view, the resulting uncertainty warrants this Court's attention. If the Court does grant review and decides — as we believe it should — that a fair representation claim arising in the context of contract negotiations may be based on arbitrary union conduct, this case provides an excellent opportunity to clarify what conduct may properly be characterized as arbitrary. These are important questions. The scope of the duty of fair representation determines the extent to which employees are protected against abuses of statutory authority conferred on unions and also, to a significant degree, controls the ability of unions to act as effective bargaining agents for employees with divergent interests.

1. a. In *Vaca v. Gipes*, 386 U.S. at 177, this Court summarized the origins and scope of the fair representation doctrine. The Court noted that a union has a statutory duty to bargaining unit employees "both in its collective bargaining" and "in its enforcement of the resulting collective bargaining agreement." "Under [the fair representation] doctrine," the Court continued, "the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the

⁸ The court of appeals affirmed the dismissal of respondents' LMRDA claim. Pet. App. B15-B19. Respondents have not sought further review of that question.

interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Ibid*.

Nothing in *Vaca* suggested that any part of the Court's definition of a union's duty of fair representation was limited to contract administration. Indeed, the Court noted that the duty is derived from the union's authority to act as the exclusive representative of a bargaining unit's employees, and the statutes conferring that authority suggest no distinction based upon the nature of the action taken on employees' behalf.⁹ The logic underlying the rule that a union may not act arbitrarily in its capacity as the exclusive representative of bargaining unit employees is no less applicable to collective bargaining than it is to the administration of negotiated agreements. Cf. *Conley v. Gibson*, 355 U.S. 41, 46 (1957) (obligation to avoid unlawful discrimination applies equally in both contexts).

The Court has never been squarely presented with the question whether *Vaca*'s three-part standard — which prohibits conduct that "is arbitrary, unjustifiably discriminatory, or in bad faith — applies to the negotiation of a collective bargaining agreement. However, the Court has often described the duty in terms that suggest no essential difference in the standards applicable to negotiating and administering collective agreements. *United Steelworkers v. Rawson*, 110 S. Ct. 1904, 1911 (1990); *Chauffeurs Local No. 139 v. Terry*, 110 S. Ct. 1339, 1344 (1990); *Breininger v. Sheet Metal Workers*, 110 S. Ct. 424, 429 (1989); *International Brotherhood of Elec. Workers v. Foust*, 442 U.S. 42, 46-47 (1979). See also *Communications Workers v. Beck*, 487 U.S. 735, 743 (1988); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563-564 (1976); *Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299 (1971); *Humphrey v. Moore*, 375 U.S. 335, 342, 350 (1964).¹⁰

⁹ See, e.g., *Steele v. Nashville R.R.*, 323 U.S. 192, 198-207 (1944) (Railway Labor Act); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953) (extending doctrine to National Labor Relations Act).

¹⁰ The discussion in *Terry* is representative. Immediately after quoting *Vaca*'s three-part standard for the duty of fair representation, the Court stated

Contrary to petitioner's contention (Pet. 19), the Court's decision in *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-338 (1953), does not foreclose liability for arbitrary conduct in collective bargaining negotiations. In *Huffman*, while explaining why a union enjoys broad authority to negotiate on behalf of bargaining unit employees, the Court observed (345 U.S. at 338):

A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

This passage does not suggest that arbitrary conduct is insufficient to sustain a fair representation claim—or that “good faith and honesty of purpose” is invariably a complete defense. In stating that a “wide range of *reasonableness*” was required for effective bargaining, the Court surely did not imply that unions should be immune from liability for arbitrary decisions. And, contrary to petitioner's suggestion, there is no essential conflict between *Vaca* and *Huffman*. *Vaca*'s requirement of non-arbitrariness, properly applied, provides unions with the “wide range of reasonableness” they require for effective negotiations while at the same time protecting employees from arbitrary action. We agree with the court of appeals, therefore, that *Vaca* provides the proper standard for this case and that a union can be held to have violated its duty of fair representation in contract negotiations by acting arbitrarily.

b. Nevertheless, the courts of appeals have expressed a variety of views on this issue. A large number of decisions have applied *Vaca*'s three-part test, including its requirement of non-arbitrary

that “[a] union must discharge its duty both in bargaining with the employer and in its enforcement of the resulting collective bargaining agreement.” 110 S. Ct. at 1344. The plain implication was that the three-part obligation described in *Vaca* applies in both contexts. Compare Pet. 19 n.9 (suggesting that *Vaca* “implicitly recognized . . . two different standards”). To be sure, since *Terry* did not present the question whether arbitrary conduct would suffice to establish a breach of the duty of fair representation, the Court's description of the duty was not a holding. Compare Br. in Opp. 8-9.

action, to the negotiation of collective bargaining agreements.¹¹ But in a substantial number of decisions, the courts have suggested that there is a difference in kind—warranting a distinction in applicable fair representation standards—between negotiating an agreement on behalf of bargaining unit employees and administering the agreement.

Thus, the Seventh Circuit has stated that “[t]here is one standard for appraising a union's conduct when a claim arises out of union action in negotiating agreements with an employer and a different standard when the claim arises from a union's administration of the collective bargaining agreement, especially in the context of processing grievances.” *Schultz v. Owens-Illinois Inc.*, 696 F.2d 505, 514 (1982).¹² Recently, extended dicta in two Seventh Circuit decisions have elaborated upon the distinction *Schultz* drew between negotiations and other actions undertaken by a union in its capacity as exclusive representative.¹³ A decision

¹¹ E.g., *Haerum v. ALPA*, 892 F.2d 216, 221 (2d Cir. 1989); *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 798 (2d Cir. 1974); *Masy v. New Jersey Transit Rail Operations, Inc.*, 790 F.2d 322, 327-328 (3d Cir. 1986); *Dement v. Richmond, F. & P. R.R.*, 845 F.2d 451, 458 (4th Cir. 1988); *Anderson v. Ideal Basic Industries*, 804 F.2d 950, 952 (6th Cir. 1986); *Bowman v. Tennessee Valley Authority*, 744 F.2d 1207, 1213-1214 (6th Cir. 1984), cert. denied, 470 U.S. 1084 (1985); *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 799 (7th Cir. 1976); *Thomas v. Bakery Workers Union*, 826 F.2d 755, 758-759 (8th Cir. 1987); *Morgan v. St. Joseph Terminal R.R.*, 815 F.2d 1232, 1234 (8th Cir. 1987); *Bernard v. ALPA*, 873 F.2d 213, 216 (9th Cir. 1989); *Hendricks v. ALPA*, 696 F.2d 673, 677 (9th Cir. 1983); *American Postal Workers Union, Local 6885 v. American Postal Workers Union*, 665 F.2d 1096, 1105-1107 (D.C. Cir. 1981).

¹² *Schultz* appears to be inconsistent with the standards articulated in the Seventh Circuit's decision in *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 799 (1976). Further, after explaining that different standards were applicable in contract negotiations and contract administration, *Schultz* went on to analyze whether a reinterpretation of a contract that the court considered analogous to the negotiation of a contract was “patently unreasonable” or “arbitrary.” 696 F.2d at 515-516. See also *Alvey v. General Electric Co.*, 622 F.2d 1279, 1287-1289 (7th Cir. 1980).

¹³ *Thomas v. United Parcel Service, Inc.*, 890 F.2d 909, 916-919 (7th Cir. 1989); *Olsen v. United Parcel Service, Inc.*, 892 F.2d 1290, 1293-1294 (7th Cir. 1990). See also *United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*,

from the Sixth Circuit suggests that "[b]ad faith or intentional misconduct by the union must be shown" to establish a breach of the duty of fair representation in "collective bargaining decisions."¹⁴ In a line of cases, the Ninth Circuit has distinguished "procedural and ministerial" acts, which will be held to violate the duty of fair representation if arbitrary, from acts involving "a union's judgment," which will be held to breach the duty only if discriminatory or in bad faith.¹⁵ The Eleventh Circuit has articulated different standards for fair representation claims arising from collective bargaining and claims arising from grievance processing, although both standards impose liability when a union has acted arbitrarily, and there seems to be little difference

756 F.2d 1274, 1281-1283 (7th Cir. 1985). The cited passages in *Thomas* and *Olsen* were dicta because the cases involved grievance processing and did not present the question, which *Thomas* and *Olsen* discussed at length, whether *Vaca* applied outside that context. In addition, in *Olsen*, the court stated that a union, when acting as the employees' representative in negotiations, "meets its duty of fair representation . . . by exercising its judgment in a manner that is not patently unreasonable. [*Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519 (11th Cir. 1988)] (a union breaches its duty in the negotiation of an agreement if its conduct is 'arbitrary, irrational, or undertaken in bad faith')." We perceive no significant difference in substance between these standards and those articulated in *Vaca*.

¹⁴ *Ratkovsky v. United Transportation Union*, 843 F.2d 869, 876 (6th Cir. 1988). See also *NLRB v. Local 299, Int'l Brotherhood of Teamsters*, 782 F.2d 46, 50-52 (6th Cir. 1986) (requiring that there have been discrimination against a subgroup of bargaining unit employees). In this respect, *Ratkovsky* appears to be inconsistent with the Sixth Circuit's decisions in *Bowman v. Tennessee Valley Authority*, 744 F.2d 1207, 1213-1214 (1984), cert. denied, 470 U.S. 1084 (1985), and *Anderson v. Ideal Basic Industries*, 804 F.2d 950, 952 (1986). Further, at one point, *Ratkovsky* states that "[i]t is well established that a claim of fair representation requires a showing of bad faith, discrimination, or arbitrary conduct on the part of the union." 843 F.2d at 876 (citing *Vaca*).

¹⁵ *Burkevich v. ALPA*, 894 F.2d 346, 349 (9th Cir. 1990); *Moore v. Bechtel Power Corp.*, 840 F.2d 634, 636 (9th Cir. 1988); *Galindo v. Stooddy Co.*, 793 F.2d 1502, 1513-1514 (9th Cir. 1986); *Peterson v. Kennedy*, 771 F.2d 1244, 1254 (9th Cir. 1985). These decisions seem to be in conflict with *Barthelemy v. ALPA*, 897 F.2d 999, 1005-1006 (9th Cir. 1990), and *Bernard v. ALPA*, 873 F.2d 213, 216 (9th Cir. 1989).

between the two.¹⁶ The First Circuit took note of a contention that fair representation claims are subject to "bifurcated standards," but found it unnecessary to decide whether separate standards should be recognized.¹⁷ Commentators have also discussed the possibility of different standards in negotiation and grievance processing.¹⁸

Many of the statements recognizing different standards for contract negotiations and contract administration have been dicta. Moreover, in preceding footnotes, we have alluded to circumstances that tend to undercut the authoritativeness of those statements — and thus perhaps to mitigate the need for this Court's review. Nevertheless, when this body of case law is examined as a whole, it displays a significant division of opinion on the question whether the standards of conduct to which unions must adhere in negotiating agreements are different from those applicable to contract administration. In our view, the uncertainty in this area is sufficient to call for this Court's attention.

2. If the Court grants review and concludes that a showing of arbitrary conduct is sufficient to establish a breach of the duty of fair representation, this case also provides an excellent opportunity to clarify the standards for determining whether a union has acted arbitrarily. The court of appeals indicated that arbitrariness could be found in a case in which a union has relinquished an established right of bargaining unit employees without receiving anything of value on their behalf. We would agree if it could be shown that the right of the employees was clearly

¹⁶ *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519-1520 (11th Cir.), cert. denied, 109 S. Ct. 2066 (1989). *Parker* stated that "in the context of negotiations," a violation of duty is established if the union's conduct "is arbitrary, irrational, or in bad faith." *Id.* at 1520. "In the context of grievance processing," the court continued, "the employee must show that the union's handling of the grievance was either arbitrary, discriminatory, or done in bad faith." *Ibid.*

¹⁷ *Berrigan v. Greyhound Lines, Inc.*, 782 F.2d 295, 297-299 (1st Cir. 1986).

¹⁸ See, e.g., Leffler, *Piercing the Duty of Fair Representation: The Dichotomy Between Negotiations and Grievance Handling*, 1979 U. Ill. L.F. 35; Harper & Lupu, *Fair Representation as Equal Protection*, 98 Harv. L. Rev. 1212, 1259-1266 (1985).

established at the time of the union's decision and if it was also clear at that time that nothing of value was received in exchange. But we disagree with the court of appeals' determination that a finding of arbitrariness could be made in this case. In our view, the court failed to take sufficient account of the legal and practical uncertainties confronting the union at the time of the settlement. Thus, the court's approach could pose severe problems for future efforts to achieve negotiated solutions of labor disputes.

The court of appeals concluded that "a jury could find that the order and award left the striking pilots worse off in a number of respects than complete surrender to [Continental]." Pet. App. B11. Most importantly, according to the court, the order and award deprived returning strikers of the right they would have had to compete with working pilots (many of whom had less seniority) for all positions encompassed by the 85-5 bid as well as later vacancies. *Id.* at B12, B14. However, when the union agreed to entry of the award and order, Continental was taking the position that it had definitively awarded the positions in the 85-5 bid to working pilots. In fact, the airline had initiated an action to invalidate bids for those positions that had been submitted by strikers. In this situation, the union faced a choice between, on the one hand, pursuing litigation to establish the strikers' rights to all of the contested positions and, on the other, accepting a compromise providing returning strikers with access to some 85-5 bid positions.

We believe that, at the time of the settlement, there was uncertainty as to whether returning strikers were legally entitled to compete for positions encompassed by the 85-5 bid. Under this Court's decisions, Continental was entitled to employ permanent replacements and cross-over strikers to continue operations during the strike and was not required to discharge those employees to make room for returning strikers. *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938). On the other hand, Continental would have been required to offer returning strikers *vacant* positions equivalent to those the strikers had held before going on strike (absent countervailing legitimate and substantial

business justifications for refusing to do so). *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). Unjustified refusals to reinstate strikers who offer unconditionally to return to work "discourage employees from exercising their rights to organize and to strike." *Ibid.*

The issue left unsettled by this Court's decisions is whether 85-5 positions "awarded" to working pilots would have been considered "vacancies" available to returning strikers. Continental's position, as we understand it, has been that the bid procedure serves its legitimate interest in designating particular employees for anticipated vacancies in advance, so that the airline can begin at once to provide necessary training and arrange to fill positions vacated by pilots who have bid successfully for better jobs. Under that position, refusing to rebid those vacancies to accommodate returning strikers could not be characterized as an unjustifiable infringement of the right to strike. The countervailing argument, as we understand it, is that an award confers only a limited, conditional expectancy of a position and that it would not have undercut Continental's legitimate interests to place returning strikers in positions that were not actually filled or for which training had not commenced. If that view of the bidding process were valid, a refusal to allow returning strikers equal access to positions available when they agreed to return might be viewed as an unjustified infringement of the right to strike.¹⁹

Regardless of how this dispute might be resolved on its merits, we believe there is no basis on which a trier of fact could find that a decision to opt for a compromise was *arbitrary*. A union in petitioner's position could legitimately take account of the risks and delay inherent in litigation in deciding whether to agree to

¹⁹ The fact that some strikers had submitted bids for positions covered by the 85-5 bid gave rise to an additional complexity. We understand that Continental sought to invalidate all those bids on the ground that they were part of a union ploy to place disloyal pilots in a position where they could disrupt the airline's operations. In view of that dispute, a litigated solution would have required a court to resolve the competing claims of three groups of pilots: (1) working pilots who bid for 85-5 positions, (2) striking pilots who submitted contested bids for those positions, and (3) strikers who sought reinstatement without having submitted timely bids.

a negotiated settlement. Further, the district court decision cited in the court of appeals' opinion, *ALPA v. United Air Lines, Inc.*, 614 F. Supp. 1020, 1045-1046 (D.C. Ill. 1985), aff'd in part, 802 F.2d 886 (7th Cir. 1986), cert. denied, 480 U.S. 946 (1987), did not clearly establish the pilots' entitlement to the 85-5 bid positions. When petitioner consented to the entry of the order and award, the *United Air Lines* decision was on appeal; the outcome of the appeal could not be known; and, especially in view of the differences between the facts of the United and Continental disputes, the Seventh Circuit's decision might well not have been followed in the circuit in which most litigation between petitioner and Continental had been brought.²⁰

A mistake in the assessment of the state of the law on this issue at a particular time would not ordinarily call for this Court's review. However, the court of appeals' decision in this case appears to involve a more fundamental problem. In its recitation of the standards by which it determines whether a union has acted arbitrarily, the court, quoting its opinion in *Tedford*, emphasized that it was necessary to determine whether a decision challenged in a fair representation case is "a rational result of the consideration of [permissible union] factors." Pet. App. B10. Judged by its application in this case, that standard appears to permit imposition of liability based upon a union's failure to anticipate

²⁰ As petitioner has noted (Pet. 25-26), in *United Air Lines*, the carrier rebid the entire airline in the early days of a strike, and the district court concluded (in light of other facts) that the rebid was motivated by anti-union animus. 614 F. Supp. at 1046. The court of appeals affirmed on this basis. 802 F.2d at 898-900. The availability of such a rationale in this case was—at the very least—subject to doubt.

In considering the significance due the district court's decision in *United Air Lines*, we believe that standards governing the availability of qualified immunity to public officials provide a useful analogy. In determining whether an official is immune from liability for an alleged violation of a plaintiff's constitutional rights, his action is "assessed in light of the legal rules that were 'clearly established at the time it was taken.'" *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818-819 (1982).

the manner in which an unsettled issue of law will be resolved.²¹ In our view, the imposition of liability on that basis would contradict the principles recognized in *Ford Motor Co. v. Huffman*, 345 U.S. at 337-338. Thus, this case affords an opportunity for this Court to consider whether, in its articulation and application of the *Tedford* formulation, the Fifth Circuit has departed from the correct standard for determining what conduct qualifies as arbitrary.²²

3. The standards circumscribing a union's duty of fair representation are an important element of federal labor law. Properly defined, the duty of fair representation provides significant protection to employees and, at the same time, gives unions needed leeway to pursue negotiated settlements. "The heart of the Railway Labor Act is the duty, imposed by [45 U.S.C. 152, First] upon management and labor, 'to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and

²¹ We note that, in the present case, the underlying issue of law is still in dispute.

The court cited evidence suggesting that Continental had honored returning strikers' seniority in the past and could be expected to do so in the future. Pet. App. B12-B14 & n.3. However, even if it would have been arbitrary for petitioner to fail to act on the indications cited by the court, petitioner would still have had to confront the question whether Continental would withdraw its "awards" of 85-5 bid positions and permit returning strikers to compete for them. That is, an assurance that strikers would have been returned on the basis of seniority would have resolved just one of two questions facing petitioner after the closing of the 85-5 bid; the other was whether Continental would be required to return strikers to positions encompassed by that bid.

²² We note that respondents have also argued, *inter alia*, that petitioner's leadership consented to the entry of the order and award based upon self-interest and political motivations, concealed their actions from the rank-and-file and their representatives, and falsely assured striking pilots that any agreement would be submitted for ratification. See Pet. App. B7. The court of appeals did not decide whether there were disputed issues of fact requiring a trial on those allegations of bad faith. These theories of liability could be considered on remand if the Court were to grant review and vacate the court of appeals' judgment.

the employees thereof.' " *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-378 (1969). See *Chicago & N.W. Ry. Co. v. United Transportation Union*, 402 U.S. 570, 574 (1971); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 758-761 (1961). The statute's objective is "to prevent, if possible, wasteful strikes and interruptions of interstate commerce." *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. 142, 148 (1969). Because of their potential impact on national transportation systems, strikes in transportation industries can have particularly severe effects on the national economy.

Recent years have seen a number of bitter labor disputes in the interstate transportation industries. Uncertainty regarding the extent to which settlements will expose unions to liability for a breach of the duty of fair representation can only complicate the efforts of management, unions, and federal mediators to achieve negotiated resolutions of those disputes. Cf. *International Brotherhood of Elec. Workers v. Foust*, 442 U.S. at 51-52. Because potential litigants in interstate transportation industries often have a choice among forums in various circuits, national uniformity in this area is particularly important. Finally, although this case arises in the context of the Railway Labor Act, the duty of fair representation also applies to employees represented by unions under the National Labor Relations Act, 29 U.S.C. 151 *et seq.* See *Ford Motor Co. v. Huffman*, 345 U.S. at 337.

4. Petitioner suggests (Pet. 29) that it would be appropriate for the Court to grant the petition, vacate the court of appeals' judgment, and remand for reconsideration in light of the decision in *Trans World Airlines, Inc. v. Independent Fed. of Flight Attendants*, 109 S. Ct. 1225 (1989). We disagree. In *TWA*, a decision rendered after the events at issue, the only question presented was whether full-term strikers were entitled to displace cross-overs who held positions at the conclusion of a strike. The Court did not address the separate issue of when cross-overs (or, for that matter, permanent replacements) acquire an interest in a position sufficient to defeat the reinstatement rights of returning full-term strikers. Nor did it address the questions of fair represen-

tation presented here. Under these circumstances, Court's decision in *TWA* does not justify summary disposition of this case.²³

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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²³ Respondents argue (Br. in Opp. 7) that review is not warranted because the court below remanded the case for further proceedings and thus its decision is interlocutory. But the court of appeals has finally determined the applicable legal standard and concluded, erroneously in our view, that a trier of fact could find the union's conduct to be arbitrary. The case is suitable for review at this juncture, because there is an "important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 225 (6th ed. 1986); see *id.* at 225-226 and cases cited therein.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
Petitioner,
v.

JOSEPH E. O'NEILL, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Docket No. H-86-1718

JOSEPH E. O'NEILL, *et al.*,
v. *Plaintiffs*

AIR LINE PILOTS ASSOCIATION INTERNATIONAL, *et al.*,
Defendants

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
4-25-86	1	COMPLAINT FOR VIOLATION OF RAILWAY LABOR ACT, LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT AND STATE COMMON LAW BREACH OF CONTRACT, filed. sv/vgb
5-16-86	14	First AMENDED COMPLAINT and Jury Demand, filed. jl Dktd 5-19-86
7-31-86	19	Defts' ANSWER, filed, sas Dkt'd 8-4-86
2-6-87	77	(LNH) MEMORANDUM ON ATTORNEY-CLIENT PRIVILEGE. filed. fs The claim of privilege against the pltfs will be overruled with a limitation on disclosure to Continental management. The claim of work product privilege will be limited to this suit and will not apply to work product in former litigation. dkt'd 2-6-87
2-6-87	78	(LNH) ORDER CERTIFYING INTERLOCUTORY APPEAL AND PARTIAL STAY OF DISCOVERY, filed. jlp Parties ntfd.

DATE	NR.	PROCEEDINGS
		<ol style="list-style-type: none"> 1. Order of this court of Feb. 6, 1987, on the pltfs' motion to compel production may be appealed to the U.S. Court of Appeals for the 5th Circuit 2. Court's order on attny client privilege only (but not work product for concluded litigation) shall be stayed pending determination of that appeal, but all discovery not directly covered by the assertion of attny-client privilege by the union shall proceed. dkt'd 2-9-87
2-6-87	79	DEFTS' MOTION FOR CERTIFICATION OF APPEAL AND FOR STAY OF DISCOVERY PENDING APPEAL PURSUANT TO 28 U.S.C. SECTION 1292(b), filed. jlp dkt'd 2-9-87 M/D Mar 2, 1987 by clerk
2-9-87	80	Pltf's MOTION FOR RECONSIDERATION of Certification of Appeal and stay pending appeal and RESPONSE to Motion for Certification and stay, filed. db dkt'd 2-10-87 M/D Mar 2, 1987 by clerk
2-26-87	83	(LNH) ORDER, filed. Parties ntfd. jlp <ol style="list-style-type: none"> 1. Pltfs' motion for reconsideration is denied. dkt'd 2-27-87
2-26-87	84	(LNH) ORDER, filed. Parties ntfd. jlp <ol style="list-style-type: none"> 1. Motion to certify this case as a class action will be considered after June 1, 1987. By that date, the pltfs must inform the court of the number of potential pltfs, and they must move for certification. The defts have until June 20, 1987 to respond to the motion if it is filed. dkt'd 2-27-87

DATE	NR.	PROCEEDINGS
8-3-87	131	Defts NOTICE OF MOTION FOR SUMMARY JUDGMENT, w/Supporting Affidavits and Exhibits. and proposed Order attached. filed. fs dkt'd 8-4-87
8-3-87	132	MEMORANDUM OF LAW IN SUPPORT OF Defts' Motion for Summary Judgment and Judgment on the Pleadings. filed. fs dkt'd 8-4-87
8-4-87 SEALED		Rec'd Depositions Submitted in support of Defts' Motion for Summary Judgment and Judgment on the Pleadings. (loose in expandable folder) fs 8-5-87
8-4-87 SEALED		Rec'd Strike Strategy Information submitted in Support of Defts' Motion for Summary Judgment and Judgment on the Pleadings. (loose in expandable folder). fs. 8-5-87
8-12-87	136	Defts' MEMORANDUM OF LAW IN OPPOSITION to Class Certification and in Response to Pltfs' Status Conference Memorandum. filed. fs dkt'd 8-12-87
8-14-87	138	(LNH) MINUTES OF MOTION HEARING. filed. fs Rptr: G Dye Appearances: Griffin, Levinson, Irvine & Abney f/defts. Wood, Kundre, Clarke-Harper, Schaden f/pltfs and interested parties. Pltf application to certify class—GRANTED. dkt'd 8-19-87
8-14-87	139	(LNH) CONFERENCE MEMORANDUM, filed. parties ntfd. fs Pltfs to provide solicitation letters and transcript to ALPA by 8/20/87. Class is certified. L & R to provide M,R 1st draft of 23(b)(3) notice asap. Discovery re: solicitation allowed. Pltfs to answer the 3 interrogatories by noon (C.D.T.) 8/18/87. No irrelevancy objections will be countenanced. Capt

DATE	NR.	PROCEEDINGS
		Duffy's redacted material to be produced to Harper or designee; material to be used in <i>this</i> case only. Any of Capt Duff's previously redacted materials that M.R. considers to be extraordinarily sensitive (or any portion of these docs) are to be sent to Court; M.R. to supply redacted and unredacted version. M.R. has 20 days to reconstruct, as best as possible, the last five. Pltfs have until 9/18/87 to oppose to s.j.; opposition can include statement that discovery on this issue is incomplete. Response due by 10/2/87. dkt'd 8-19-87
9/18/87	147	PLTFS' RESPONSE TO DEFT ALPHA'S MOTION FOR SUMMARY JUDGMENT, filed. jlp dkt'd 9-18-87
9-25-87	149	PLTFS' MEMORANDUM OF LAW IN RESPONSE TO DEFTS' MOTION FOR SUMMARY JUDGMENT, VOL 1-5, filed. (UNDER SEAL) jlp dkt'd 9-28-87
10-9-87	153	REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFTS' MOTION FOR SUMMARY judgment and judgment on the pleadings, w/exhibits, filed. jlp dkt'd 10-13-87
11-30-87	158	(LNH) CONF MEMORANDUM (HEARING IN COURT), filed. Parties ntfd. (Rptr: F. Warner) Appearances: Wood, Hulsman, Harper, Clarke f/pltf; Irvine, Levine, Griffin f/deft Pltf & deft stipulate that Henry Duffy, D. Higgins, D. Schnell, R. Lappin and D. Henderson are improper deft under Count 1. Pltf and deft stipulate that ALFA and CAL MEC are improper defts under count 3. An order will be entered granting deft's motion for summary judgment. jlp dkt'd 12-3-87

DATE	NR.	PROCEEDINGS
12-2-87	159	TRANSCRIPT OF COURT RULING OF NOV 30, 1987, filed. jlp dkt'd 12-3-87
12-9-87	161	(LNH) FINAL JUDGMENT, filed, Parties ntfd. mcs Pltf take nothing from defts. Costs taxed against pltfs. Dkt'd 12-14-87
10-11-87	162	TRANSCRIPT OF MOTION FOR SUMMARY JUDGMENT BEFORE JUDGE HUGHES Nov. 30, 1987, filed jlp dkt'd 12-16-87
12-23-87	163	O'NEILL GROUP MOTION FOR RECONSIDERATION OF THE COURT'S DEC 9, 1987 ORDER GRANTING DEFTS' MOTION FOR SUMMARY JUDGMENT w/ attachments (3 volumes), filed. jlp dkt'd 12-24-87 (UNDER SEAL)
1-15-88	165	DEFTS' MEMORANDUM IN OPPOSITION TO PLTFS' MOTION FOR RECONSIDERATION OF THE COURT'S DEC. 9, 1987 ORDER GRANTING DEFTS' MOTION FOR SUMMARY JUDGMENT, w/exhibits. filed. jlp dkt'd 1-19-88
1-29-88	168	O'Neill Group REPLY IN SUPPORT of its Motion for Reconsideration. filed. fs dkt'd 2-3-88
3-21-88	172	SUPPLEMENTAL REPLY IN SUPPORT OF O'NEILL GROUP MOTION FOR RECONSIDERATION, w/exhibits, filed. jlp dkt'd 3-22-88
3/23-88	173	DEFTS' OPPOSITION TO PLTFS' SUPPLEMENTAL REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION, filed. jlp dkt'd 3-24-88
8-8-88	174	(LNH) ORDER DENYING RECONSIDERATION, filed. bj parties ntfd The pltfs' motion to reconsider the summary judgment of Dec. 14, 1987, is denied. dkt'd 8-10-88

DATE	NR.	PROCEEDINGS
9-1-88	175	Pltfs' NOTICE OF APPEAL from Order entered on Aug 8, 1988, filed. bw dkt'd 9-7-88
1-30-89	182	Certified Copy of ORDER by Court of Appeals REMANDING to District Court to enable the parties to file a motion seeking correction of the judgment, IT IS FURTHER ORDERED that the proceedings in this Court are STAYED pending the district court's ruling on such motion, filed. bw dkt'd 2-17-89
-1-89	187	(LNH) AMENDED FINAL JUDGMENT, ENTERED. Parties ntfd. All Pltfs, including the class take nothing from Defts. Costs are taxed against the Pltfs.
-1-89	188	(LNH) OPINION ON AMENDED FINAL JUDGMENT, ENTERED. Parties ntfd. mac Some pltfs were omitted from the judgment of Dec 9, 1987, it is amended to include all pltfs who are a party to this suit and is a final and appealable order.
-6-89	189	Pltf's NOTICE OF APPEAL to Final Judgment entered Mar 1, 1989, filed. Dkt'd 3-7-89
-25-90	190	Certified copy of the JUDGMENT by the CCA on 10-31-89 issued as MANDATE 1-19-20 VACATING the judgment of the District Court and REMANDING to the District Court for further proceedings and it is further ORDERED that debt-appellees pay to pltf-appellants the costs on appeal, filed. eod 3-9-90 km
-25-90	191	Certified copy of the OPINION by the CCA, filed. eod 3-9-90 km

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: CONTINENTAL AIRLINES CORPORATION,
Case No. 83-04019-H2-5

CONTINENTAL AIR LINES, INC.,
Case No. 83-04020-H1-5

TEXAS INTERNATIONAL AIRLINES, INC.,
Case No. 83-04021-H3-5

TXIA HOLDINGS CORPORATION,
Case No. 83-04022-H3-5
DEBTORS

Consolidated Under
Case No. 83-04019-H2-5

**ORDER RELATIVE TO CLAIMS,
CONTROVERSIES AND RELATED LITIGATION**

This matter has come on before the Court upon the joint motion and request of the above-named Debtors (hereinafter "Continental") and the Air Line Pilots Association, International (hereinafter "ALPA"), for the entry of an Order resolving their pending claims, controversies and related litigation.

Pursuant to orders of this Court dated July 2, 1985, Continental and ALPA have been engaged in lengthy and complex negotiations to settle and compromise their disputes, to end the ongoing ALPA strike against Continental, to resolve all other pending claims and litigation

and to assure a fair and equitable treatment of all pilot employees of Continental—those now at work and those on strike. Settlement discussions between Continental and ALPA have continued non-stop since October 18, 1985. Continental and ALPA have consented to have this Court resolve all outstanding issues submitted this Court.

After considering all matters and issues before the Court as between Continental and ALPA, this Court, in the exercise of its equitable powers pursuant to Section 105 of the Bankruptcy Code, and as an interest arbitrator pursuant to the agreement and consent of ALPA and Continental, hereby makes the following findings and orders:

1. Continental and ALPA have consented in open Court on October 30 and 31, 1985 to the entry of an Order by this Court, both in its Judicial capacity and as a Interest Arbitrator (the latter designation having been specifically requested, agreed and consented to by Continental and ALPA in open Court on this date) to render a final, binding, non-appealable decision on all outstanding issues as between Continental and ALPA; and

2. Continental and ALPA have further agreed in open Court, both by and through statement of counsel and by authorized representatives on October 30, 1985 to waive any right to appeal, modify or otherwise challenge the decision and award of this Court with respect to all issues as between Continental and ALPA.

Based on the foregoing, it is accordingly ORDERED, ADJUDGED and DECREED:

1. The determination and resolution of claims and controversies is set out in Exhibit "1"; and

2. Continental and ALPA are ordered and directed to take such steps as are necessary to implement in Exhibit "1" to this Order; and

3. Continental and ALPA are ordered and directed to file such pleadings as are necessary to dismiss all litigation pending between them in the Bankruptcy Court, any United States District Court, any United States Courts of Appeals, or otherwise, as such litigation is more specifically set out in attachment "B" to Exhibit "1" hereto.

It is so ORDERED, ADJUDGED AND DECREED this 31st day of October, 1985.

/s/ _____
T. GLOVER ROBERTS
United States Bankruptcy Judge

ORDER AND AWARD

I. *Termination of Strike and Back To Work Issues*A. *General*

1. *Termination of Strike.* Effective with the entry of this Order and Award, ALPA shall terminate its strike against Continental Airlines and all picketing, job actions, boycotts, disparagement and public statements by ALPA, (or any ALPA spokesman, representative, officer or agent) critical of the pilots or operations of Continental Airlines and all other strike-related activities directed against Continental, or any affiliate of Continental shall cease.

2. *No Recrimination or Retaliation.* No pilot shall be subject to discrimination, fines or harassment, either by ALPA or by the Company, due to legally protected strike activities, work during the strike or service as a replacement pilot during the strike period. These assurances against recriminations or retaliation expressly apply to employment or reemployment at Continental or at another employer. This will not affect ALPA's right to determine who will be continued as a member or readmitted to membership.

3. *Terminated Pilots.* All striking pilots terminated for cause between September 24, 1983 and the date of this Order and Award, except those convicted of a felony offense, shall have the right to submit their case to arbitration, as provided in Section V below; such pilots shall not be eligible to elect to return to work unless and until reinstated as a result of such arbitration.

B. *Reinstatement Rights and Procedures*

1. *Right to Reinstatement* All pilots on the July 31, 1983 seniority list who are not currently active or on authorized leave and who have not resigned, retired, or been terminated for cause (subject to reinstatement by

arbitration pursuant to section I.A.3.) shall be eligible to elect recall and reinstatement in accord with the procedures set forth herein. All such pilots who elect recall and resolution of their claims against Continental, its employees and affiliates, as provided in Section III.B.1., infra, shall be placed on a new preferential recall list in seniority order, and shall be treated for purposes of this Order and Award as having made an offer to return to work as of September 15, 1985. Such a pilot who elects recall but does not wish to resolve his/her claims in said manner shall be placed on the recall list and recalled subsequent to the recall of waiving pilots in the order in which his/her unconditional offer to return to work was received by Continental.

2. *Filling of Vacancies.*

(a) *New Vacancies.* All future vacancies will be made available to eligible working pilots and returning strikers in accord with the provisions of this paragraph 2. "Vacancy" as used herein means any unstaffed pilot position which results from systemwide expansion or attrition; a redistribution of aircraft or flight time which does not result in a net increase in the total number of system Captains or the total number of system First Officers does not create a "vacancy". No working pilot (including training, supervisory and management pilots) shall be displaced in status from his/her awarded bid position as a result of the return to work of a striking pilot. Except as provided in sub-paragraphs (b) and (c) below, striking pilots who are reinstated will thereafter bid with working pilots and pilots on approved leaves of absence for all new vacancies. A pilot who has elected the Recall Option must thereafter accept a vacancy offered to him/her; a pilot who declines to accept such a vacancy shall be removed from the seniority list and shall have no further rights under this Order and Award. A pilot has an obligation to keep Continental current on his/her address for contact.

(b) *Initial Assignments.* The status of a returning striker (Captain, First Officer, Second Officer) shall be determined on the basis of seniority among available vacancies in accord with the provisions of subparagraph (c), *infra*, provided that (1) any pilot who was not holding a Captain position as of September 24, 1983 and who has been out of Continental service for a period in excess of 24 months prior to his/her return to service shall be required to fly six (6) months in a First Officer position before being eligible for assignment to a Captain position; and (2) any pilot who held a Captain position as of September 24, 1983 and who has been out of Continental service for a period in excess of twenty-four (24) months prior to his/her return to service, shall be required to fly four (4) months in a First Officer position before being eligible for assignment to a Captain position. The initial base and equipment of a returning striker shall be assigned by the Company; the base and equipment of a returned striker in his/her initial post-strike service as a Captain may also be assigned by the Company. Thereafter base and equipment will be determined in accord with the Pilot Employment Policy.

(c) *Allocation of Vacancies: Transitional Provisions.* In light [of] the unique circumstances of this Order and Award, current and future vacancies shall be allocated in accord with the following provisions of this subparagraph (c).

(i) All pilots awarded positions on Vacancy Bid 1985-5 shall receive the position awarded, subject only to delay to a date necessary to accommodate the return of striking pilots in accord with the provisions of this paragraph (c). The Company may reallocate the awarded vacancies on that bid to different equipment within status where necessary to accommodate changes in the projected fleet, provided that the total number of awarded vacancies by status shall not be increased by such an adjustment.

(ii) Currently working pilots shall assume the first 100 Captain positions awarded in Vacancy Bid 1985-5. Subject to the provisions of subparagraph (b), the next 70 Captain positions shall be awarded in seniority order to returning strikers who have resolved their claims against Continental, its employees and affiliates, as provided in Section III.B.1., *infra*. Thereafter returning strikers shall assume Captain positions on a 1:1 ratio with working pilots (i.e. every other Captain position to a returning striker); said ratio shall remain effective unless and until changed as provided in subparagraph (c) (v) below. The award of 70 Captain positions to such returning strikers shall commence no later than May 1, 1986 and be accomplished no later than August 1, 1986. In the event any of these positions is not available by August 1, 1986, the Company will pay protect each adversely affected First Officer at Captain rates of pay until that First Officer Achieves a Captain position.

(iii) The Company will make available to returning strikers who have resolved their claims against Continental, its employees and affiliates, as provided in Section III.B.1.-2., *infra*, 70 First Officer vacancies, commencing as of January 1, 1986, on a schedule sufficient to allow returning strikers to assume the 70 Captain positions made available by subparagraph (c) (ii), *supra*. Thereafter, the Company will award sufficient First Officer positions to returning strikers to provide for advancement to Captain in accordance with the schedule and ratio set forth above.

(iv) Following the award of 70 Captain positions to returning strikers, additional captain positions are projected to become available according to the following schedule, to be filled by working pilots and returning strikers on a 1:1 basis:

(a) 46 additional Captain positions by 10/1/86;

(b) 46 additional Captain positions by 1/1/87;

- (c) 46 additional Captain positions by 7/1/87;
- (d) 46 additional Captain positions by 1/1/88;
- (e) 46 additional Captain positions by 7/1/88.

In the event any of the foregoing Captain positions is not available by the projected date, the Company will pay protect each adversely affected First Officer at Captain rates of pay until that First Officer achieves a Captain position. In the event of increases to staffing requirements, the projected Captain vacancy schedule will be accelerated accordingly and will continue to be allocated on a 1:1 basis between working pilots and striking pilots.

(v) The 1:1 ratio for filling Captain vacancies shall remain in effect until October 1, 1988. The question of what ratio for Captain vacancies should remain in effect beyond that time shall be submitted to final and binding arbitration in accord with the following provisions. The arbitrator or the method for selection of the arbitrator shall be designated by the parties in a side agreement. Either the Company or any affected pilot may request the commencement of an arbitration proceeding on or about April 1, 1988. The Company or the affected pilot shall thereupon notify the arbitrator and the parties shall jointly schedule an arbitration, which must be commenced within sixty (60) days of the initial request. The arbitration shall be conducted in accord with the rules and procedures of the American Arbitration Association and any resulting Award shall be subject to review and/or enforcement under the U.S. Arbitration Act. The affected pilot(s) may designate any personal representative to appear in his (their) behalf. The arbitrator shall take into account all relevant facts and circumstances in reaching his decision; in no event shall the final ratio be zero for either the working pilots or the striking pilots.

(vi) Striking pilots awarded the first 70 First Officer positions which become available to returning strikers

shall not be assigned a Second Officer vacancy in the interim; all other returning strikers must accept assignment to available vacancies in seniority order subject to the provisions of this paragraph 2.

(vii) For purposes of this Order and Award, "returning striker" means a pilot on strike as of September 15, 1985 (including those then on the preferential recall list) who elects recall pursuant to the terms of this Order and Award; "working pilot" means a pilot in active service (including flight instructors, supervisory and management pilots), in training, or on authorized leave as of September 15, 1985. New hire pilots who received employment commitments prior to September 15, 1985, but entered training thereafter shall be entitled to hold Second Officer positions until entitled to advance to other positions in accord with the Pilot Employment Policy. It is understood that the Company may advance the dates of assignment as Captains (subject to the provisions of subparagraph b).

(d) *Reductions In Force.* In the event of a future reduction-in-force, pilots will be displaced in status and/or furloughed on the basis of seniority; in any subsequent recall, pilots displaced or furloughed as a result of the reduction in force shall be reinstated in their former positions prior to (1) the advancement in status of any other pilot to such positions and (2) the recall of any pilot then on the preferential recall list.

3. *Seniority List.*

(a) The CAL/TXI integrated pilot seniority list effective July 31, 1983, will be revised by deleting all pilots who have resigned, retired, elected severance, not responded to the Notice in paragraph 5(a) below, or been terminated for cause (subject to reinstatement by arbitration pursuant to paragraph I.A.3.). Pilots presently classified as permanently disabled will be treated in accord with subparagraph (b), below. Pilots on furlough

status as of September 24, 1983 who are not currently active or on authorized leave may have their seniority adjusted to reflect credit only for periods of active service in accord with subparagraph (c) below. All pilots hired since October 1, 1983 will be placed on the revised list in order of date of hire and date of birth within training class. The new list will be published forthwith.

(b) Pilots on permanent disability status as of the date of this Order and Award will be given the option to elect a return to active service, or alternatively, to be removed from the Seniority List, in accord with the following procedures. Each such pilot will be notified of his options in accord with Section I.B.5. of this Order and Award; a pilot who elects to pursue recall will be given a medical and/or psychiatric examination (as appropriate, based on the nature of disability) by a Company-selected medical examiner on or before January 15, 1986 to determine eligibility for recall. If the pilot is deemed by the medical examiner to be medically certifiable for active flight duty on or before December 31, 1988, such pilot will be retained on the seniority list and will be activated as soon as medically qualified; such pilot will remain on permanent disability status until activated. If a pilot should fail to so qualify for active flight duty on or before December 31, 1988, or voluntarily elects not to seek recall, his name shall be permanently removed from the seniority list and he shall have no further rights of recall or reinstatement; the disability benefits of such a pilot shall continue without interruption.

(c) Pilots on the integrated pilot seniority list effective July 31, 1983 who were on furlough status as of September 24, 1983 and who are not currently active or on authorized leave shall remain on the seniority list in accord with the provisions of this paragraph. The seniority and seniority number of such striking pilots holding seniority numbers up to and including No. 1897 shall

remain intact and unaffected. The seniority and seniority number of such striking pilots holding numbers 1898 through 2025 will be subject to a seniority integration process with pilots hired since September 24, 1983 whereby each such returning furloughed pilot will be assigned a revised seniority number upon the earlier of (1) his return to pay status or (2) January 1, 1987; the revised seniority number will be based on that pilot's length of active service as of the date of such assignment in relationship to the length of active service of pilots hired since September 24, 1983, i.e. the returning furloughed pilot's new seniority number will be in rank order behind a pilot with more time in active service and ahead of a pilot with less time in active service. Time on leave, on furlough, on strike or awaiting recall does not constitute active service for purposes of this Section. This Order and Award modifies the Seniority Integration and Fence Agreement executed August 18, 1982 and the integrated seniority list issued pursuant thereto.

4. *Retention of Recall Rights.* All pilots electing the option of returning to work will retain their right to reinstatement until December 31, 1988; if such a pilot has not been reinstated by that date, his/her name shall be removed from the seniority list and s/he shall have no further right to recall or other rights under this Order and Award; provided, however, that in the event of a reduction in force commencing between the date of this Order and Award and December 31, 1988, the period of time during which recall rights remain in effect shall be extended beyond December 31, 1988 for a length of time equal to the length of time such a reduction in force remained in effect.

5. *Notification and Recall Procedures.*

(a) Within ten days of the date of this Order and Award, the Company shall mail the attached Notice of Options to all striking pilots to advise them of their

options under this Order and Award. (Notice to be drafted as Attachment A).

(b) All pilots so notified in writing will have twenty-one (21) days from their receipt of said Notice to advise the Company in writing of their intent to return to work or elect any other option(s) made available to them by this Order and Award. A pilot who receives said Notice, or who refuses or avoids said Notice, and fails to respond and elect his options within the time specified shall have his/her name removed from the seniority list and shall have no further rights under this Order and Award.

(c) If the Company is unable to notify a pilot concerning reinstatement and other options made available by this Order and Award, the Company shall temporarily bypass for reinstatement such pilot. The Company and ALPA shall attempt to locate such pilot and deliver said Notice for a period of forty-five (45) days from the date of mailing her/his Notice. If such pilot has not then been located by either party and acknowledged receipt of the Notice of Options his/her name will be removed from the System Seniority List and he/she shall have no further rights under this Order and Award.

(d) For the purposes of this Section, "notified in writing" means attempted delivery to the last known address by the U.S. Postal Service of a letter sent Certified Mail, marked "Deliver to Addressee Only" and return receipt requested.

(e) A pilot electing reinstatement will subsequently receive a separate Recall Notice specifying a scheduled reporting date for training. Upon recall, a pilot will be allowed at least fourteen (14) days, from the date of the recall notice, to report for training. A recalled pilot shall confirm to the Company in writing within five (5) days of receipt of recall notice that he will return to service and report for training as scheduled. A pilot who fails to confirm his intention to return or to actually report

for training within the time frame specified above will be considered out of the service of the Company and his/her name will be removed from the System Seniority List. For the purposes of this paragraph all required written notices between the Company and the pilot means attempted delivery to the last known address by the U.S. Postal Service of a letter sent Certified Mail, marked "Deliver to Addressee Only" and return receipt requested.

6. *Medical Qualification of Returning Pilots.*

(a) Each returning pilot must complete a Company physical and psychological examination. Additionally, each returning pilot must maintain a Class I Federal Aviation Administration Medical Certificate; however, those returning to First and Second Officer positions may utilize the Class I FAA Medical Certificate for a period of twelve (12) months or as consistent with Federal Air Regulations. If a pilot cannot maintain the Class I certificate, s/he will so notify the Company in writing and will thereafter be permitted to bid only for vacancies in a status which his/her medical certificate, seniority and FARs allow him/her to hold.

(b) In the event a pilot fails to pass the Company physical examination, the following procedure will apply except in those cases where disqualifying drugs have been detected in the drug screen test*:

(i) A copy of the findings of the Company medical examiner shall be furnished to the pilot within fifteen (15) days. In the event that the pilot disagrees with such findings, the pilot may, within seven (7) days, employ a qualified medical examiner of his/her own choosing and at his/her own expense for the purpose of conducting a second medical examination.

* A pilot adversely affected as a result of a drug screen test shall have the right to grieve any adverse action in accord with the Pilot Employment Policy.

(ii) In the event that the findings of the medical examiner chosen by the employee disagree with the findings of the medical examiner employed by the Company, the Company will, at the written request of the employee, given within seven (7) days of such disagreement, ask that the two medical examiners agree upon and appoint a third, qualified and disinterested medical examiner, preferably a specialist, for the purpose of making a further medical examination of the employee.

(iii) The said disinterested medical examiner shall then, as soon as practicable, make a further examination of the pilot in question and the case shall be settled on the basis of his/her findings. Copies of such medical examiner's report shall be furnished to the Company and to the pilot as soon as practicable.

(iv) The expense of employing the disinterested medical examiner shall be borne one-half by the pilot and one-half by the Company.

7. *Compensation While in Training.*

A returning pilot in training at a place other than his/her last home base shall be provided lodging, transportation and per diem as specified herein:

(a) Pilots shall be provided suitable single room accommodations and shall be provided, or reimbursed with proper documentation, reasonable transportation to and from the training facility and the airport.

(b) The Company shall teletype an on-line round-trip positive space (PS-5) pass authorization on the on-line city nearest such pilot's location if s/he is not residing in the city where his/her training is to be provided. Such passes shall be available at the ticket counter and valid for use two (2) days prior to the pilot's scheduled report date for training until two (2) days following the day his/her training is completed. If the pilot is unable to travel during these two (2) days due to passenger

loads, his/her pass authorization shall be renewed as needed. A pilot who is unable to travel to training due to passenger loads shall be offered and assigned alternative training sessions and s/he shall not have his/her return to active duty affected due to his/her inability to travel.

(c) The Company shall teletype an on-line positive space (PS-5) pass authorization to the on-line city nearest a pilot's location in order for him/her to report for his/her first day of duty with the Company if s/he does not reside in the city where his/her Home Base Domicile is located. Such pass shall be valid for use two (2) days prior to the date s/he is scheduled to report for duty with the Company.

(d) A pilot, when in training, shall be paid per diem in accord with the Pilot Employment Policy. A pilot will be placed on the payroll after five (5) days in training whether or not s/he has completed training; the pay status will be that of the position the pilot is expected to occupy on his first day of active service as a line pilot.

8. (a) Training will be accomplished in accordance with the Company's FAA Approved Flight Crew Training Manual. In addition to the syllabus of training outlined in the manual, up to two additional simulator periods will be scheduled if necessary to satisfactorily complete the required training periods. Scheduling of training will normally insure changes of instructor. If a pilot fails to qualify, he/she will repeat the syllabus including the two extra simulator periods if required after a maximum fourteen (14) day period free of all duty. The syllabus may be reduced during the second training cycle by the pilot if desired, i.e., ground school, CPTs, etc.

(b) The disposition of a pilot who fails to qualify after the second training cycle will be determined by the Vice President-Flight Operations, subject to the pilot's right to pursue the dispute resolution procedure

in Section V below. Nothing herein shall constitute a requirement that the Company maintain a permanent First or Second Officer position for a pilot who has failed to qualify for a promotion to Captain.

9. Striking pilots who elect recall will accrue seniority for all purposes during period of strike and while awaiting recall; such pilots will not accrue longevity credit for active service for purposes of pay and vacations for such periods. Pilots who were not in continuous active service from October 31, 1983 through December 31, 1983 shall not receive any stock or other rights under the Stock Bonus Plan.

II. *Severance Option And Claims Waiver*

A. *Severance Pay and Claims Waiver*

1. Each active pilot on the CAL/TXI integrated seniority list as of September 24, 1983, as revised by Paragraph I.B.3., including those pilots who have been terminated (subject to reinstatement by arbitration pursuant to Section I.A.3.) who (a) has not died, resigned, retired, or become permanently disabled, and (b) who is currently on strike and (c) who is not employed (on the active payroll) as a pilot by an F.A.R. Part 121 air carrier as of the date of this Order and Award will be given the option of electing Severance Pay, in exchange for (1) waiver of his/her right to recall and (2) waiver of all claims against the Company, its employees and affiliates, as set forth in paragraph II.C. below. A pilot electing this Severance Pay Option shall notify the Company of his election within twenty-one (21) days following his receipt of the Notice provided pursuant to Section I.B.5; such election shall be irrevocable and shall constitute resignation of his/her seniority number and a waiver of all further rights to recall or reinstatement. The Severance Pay Option shall be deemed waived and unavailable to any pilot who does not notify the Company in writing of his election of the Severance Option within

twenty-one (21) days of his receipt of the Notice of Options provided pursuant to Section I.B.5, supra. The parties shall cooperate in identifying those pilots employed at Part 121 air carriers.

2. The amount of Severance Pay for each pilot eligible to elect this option pursuant to paragraph 1 will be calculated by multiplying \$4,000 times the number of years of active service with the Company as of September 24, 1983; provided however, the total dollar amount of severance pay for those pilots electing severance who were not drawing ALPA strike benefits as of September 15, 1985 and were not on furlough status as of September 24, 1983 shall not exceed \$2.6 million. In the event a sufficient number of pilots in this category elect severance pay which causes the dollar amount to exceed \$2.6 million, the \$4,000 multiplier shall be reduced sufficiently so that pilots in this category do not receive a total aggregate severance pay distribution exceeding \$2.6 million. Years of service will be calculated by crediting the pilot with one (1) year of active service for each calendar year of active service as a pilot, with partial years to be pro-rated, during the period beginning with the pilot's date of hire shown on the CAL/TXI integrated seniority list and ending on September 24, 1983.

3. A pilot on furlough status as of September 24, 1983 who is not currently active (including those pilots who have been terminated (subject to reinstatement by arbitration pursuant to Section I.A.3.) and who has not died, resigned, retired, or become permanently disabled and who is not employed (on the active payroll) as a pilot by a Part 121 air carrier as of the date of this Order and Award will be given the option of electing Severance Pay subject to the same waivers and procedures set forth in paragraphs II.A.1-2., supra, provided that the severance rate will be \$2,000 per year of active service as of September 24, 1983. The parties shall cooperate in identifying those pilots employed at Part 121 air carriers.

4. The schedule for payment to those electing this Severance Pay Option will be as follows:

10%—on or before December 15, 1985.

15%—upon confirmation of a reorganization plan, but in no event later than June 30, 1986.

Balance—quarterly payments in accordance with the following schedule commencing September 30, 1986.

- (a) 1 year-5 years active service—4 quarterly payments
- (b) 6 years-10 years active service—8 quarterly payments
- (c) 11 years-15 years active service—12 quarterly payments
- (d) 16 years-20 years active service—16 quarterly payments
- (e) 20 years + active service—20 quarterly payments

The Company may accelerate the timing and/or increase the amount of such payments.

Interest at a rate of 10% shall accrue on amounts which remain due after eight quarters from September 30, 1986. The Company shall not be responsible for withholding FICA or FIT from these payments but will supply each payee with an annual Form 1099 showing the amount paid in each taxable year.

B. *Early Out Pass Privileges and Claims Waiver*

1. Each pilot on the CAL/TXI integrated seniority list who was in furlough status as of September 24, 1983, and who is not currently active and who has not resigned, retired, or been terminated for cause (subject to reinstatement by arbitration pursuant to paragraph I.A.3.) and who is not employed (on the active payroll) as a

pilot by a Part 121 air carrier as of the date of this Order and Award, shall be eligible (in addition to severance pay pursuant to Section I.A.3.) to elect Early Out Pass Privileges as set forth in subparagraph B.2. *infra* in exchange for (1) waiver of his/her right to recall and (2) waiver of all claims against the Company, its employees and affiliates, as set forth in subparagraph II.C. below. A pilot electing this Early Out option shall notify the Company of his election within twenty-one (21) days following his receipt of the Notice provided pursuant to Section I.B.5.; such election shall be irrevocable and shall constitute resignation of his/her seniority number and a waiver of all further rights to recall or reinstatement. The Early Out Option shall be deemed waived and unavailable to any pilot who does not notify the Company in writing of his election of the Early Out Option within twenty-one (21) days of his receipt of the Notice of Options provided pursuant to Section I.B.5., *supra*.

2. Pilots electing this Early Out option shall receive pass privileges commencing January 1, 1986, as follows:

Pass Privileges (on-line only)

Hire Date	Annual On-Line Round-Trips	Service Charge
August 1, 1965 or before	20	(Same (As For (Active (Employees
August 2, 1965 through August 1, 1975	8	(Employees
August 2, 1975 through August 1, 1980	6	(
August 2, 1980 through August 1, 1982	4**	(

The number of passes per year is an equal number for the employee and the same number of additional passes

** The pass benefit in this category (3 to 5 years of seniority) expires five years from the date of resignation or upon the death of the employee. The benefit for the other categories is for the lifetime of the employee.

for each eligible immediate family member. All pass privileges are subject to Company rules concerning pass privileges; violation of those rules may result in suspension or termination of pass privileges. Any personal income tax consequences arising from use of passes will be the responsibility of the employee. While there are currently no taxes applicable, we cannot predict what the IRS requirements may be in the future. Service charges apply.

C. *Waiver of Claims.*

As a condition to election of the Severance Pay Option or the Early Out Option, each pilot who desires to pursue either Option shall be required to (a) execute a waiver and release of any and all legal claims of any nature against Continental Airlines, its employees (including officers and directors) and affiliates (including Texas Air Corporation) and their employees (including officers and directors), except bankruptcy claims for 1) unpaid pre-petition wages (including bank time and earned per diem) 2) unpaid pre-petition medical and dental expense claims, 3) accrued but unused vacation and 4) reimbursable pre-petition expenses (including moving expenses) (the "surviving bankruptcy claims"), (b) to commit these surviving bankruptcy claims to a trustee to be named by the Company for voting purposes only, with instructions to vote the claims in support of Continental's proposed Reorganization Plan; and (c) to agree to be subject to all the actual final amount due for the surviving bankruptcy claims shall be determined by informal conference between the Company and the employee; in the event of continued disagreement, the final amount due will be determined pursuant to procedures approved by the Bankruptcy Court. The final amount due will be paid in accord with the terms of the final Reorganization Plan to be approved by the Bankruptcy Court.

III. *Other Claims and Litigation*

A. *ALPA Bankruptcy Claims*

All bankruptcy claims filed by ALPA, and all motions and appeals relating thereto, shall be withdrawn and treated as settled and dismissed with prejudice; this provision shall not apply to (1) issues relating to unpaid pre-petition contributions owed by Continental to the Pilot Pension "B" Plan, which issues shall be subject to resolution outside the scope of this Order and Award; (2) the ALPA claim for prospective medical insurance costs for pilots who were in retired status as of September 24, 1983, which shall be subject to resolution as a Bankruptcy Claim but subject to a maximum cap on total liability of \$500,000.

B. *Individual Claims*

1. *Undisputed Items to Be Paid.* Continental will pay 100% of the bankruptcy claims of all pilots, for 1) unpaid pre-petition wages, (including bank time and earned per diem), 2) unpaid pre-petition medical and dental expense claims, 3) accrued but unused vacation and 4) reimbursable pre-petition expenses (including moving expenses), subject only to final determination of the amount due. The actual amount due for such items shall be determined by informal conference between the Company and the employee; in the event of continued disagreement, the final amount due will be determined pursuant to procedures approved by the Bankruptcy Court. The Company will also pay amounts due pursuant to the resolution of ALPA Grievance 12-83 and any other unpaid Grievance Arbitration Awards for monetary relief entered prior to September 24, 1983. In any event, payment for such claims will be in accord with the terms of the final Reorganization Plan to be approved by the Bankruptcy Court.

2. *Waiver of Disputed Items and Release of All Other Legal Claims.* Continental has disputed liability for all

other items asserted as Bankruptcy Claims by individual employees and for all other legal claims threatened or asserted by individual employees. As a condition to participation in the recall by seniority order pursuant to Section I.B., individual striking pilots will be required (a) to waive and release all such disputed bankruptcy claims and all other legal claims of any nature against Continental, its employees (including officers and directors) and affiliates (including Texas Air Corporation) and their employees (including officers and directors); (b) to commit their remaining undisputed bankruptcy claims to a trustee to be named by the Company for voting purposes only with instructions to vote the claim in support of Continental's proposed Reorganization Plan; and (c) to agree to be subject to all terms and provisions of this Order and Award.

3. *Treatment of Pilots Who Decline Waiver.* A striking pilot who declines to execute the waiver described in paragraph III. B. 2, supra, will retain his right to recall but will be recalled subsequent to the recall of waiving pilots and in the chronological order in which each such non-waiving pilot contact(ed) Continental to tender an unconditional offer to return to work. ALPA shall provide no support or assistance, direct or indirect, to any such non-waiving pilot in further pursuit of his bankruptcy claims, or any other claims against Continental, its employees (including officers and directors) or its affiliates and their employees (including officers and directors).

4. *Minimum Level of Participation.* Continental shall have the right to abrogate this Order and Award in the event that less than 80% of the striking pilots eligible to elect options pursuant to this Order and Award fail to elect either (a) Recall with waiver of disputed claims, or (b) The Severance Pay Option and Claims Waiver, or (c) The Early Out Pass Privileges and Claims Waiver.

5. *Remedies in Event of Future Job Actions.* In the event of any job action, slowdown, sick-out, withdrawal of enthusiasm, inordinate fuel burn, inordinate mechanical write-ups or any other improper concerted action by striking pilots who have returned to work, Continental shall have the right to seek an immediate hearing upon 24-hour notice (or such different notice as the Court may set) before Bankruptcy Court Judge Glover T. Roberts (or, if he is unavailable, before the Bankruptcy Court). The Court shall have jurisdiction to issue immediate injunctive relief and such other forms of relief, including damages, as the Court deems appropriate in the circumstances.

C. *Other Bankruptcy Proceedings.*

Except as otherwise provided herein, ALPA will not further participate in Bankruptcy Court proceedings relating to Continental or its affiliates; provided, however, that ALPA may be selected by an affected pilot to appear as his personal representative where a personal representative is permitted to participate in proceedings pursuant to this Order and Award. ALPA will withdraw from further participation in the activities of the Official Union Labor and Pension Creditors Committee.

D. *Pension Issues.*

All pension issues are to be resolved as provided in Attachment C. All claims arising from the freezing, rejection, or termination of any pilot pension plan shall be treated as settled and dismissed with prejudice.

E. *Other Claims and Litigation.*

All pending litigation cases between ALPA, Continental (and its affiliates and their employees, officers and directors) (the "parties") will be treated as settled and dismissed with prejudice and all claims against such parties shall be waived with respect to the subject matter of the pending litigation being dismissed. Continen-

tal will also dismiss its claims against each individual pilot defendant in such litigation who elects an option under this Order and Award which includes resolution of all of his claims against Continental, its employees and affiliates in accord with Section II.C. or Section II.B.2. Continental shall provide no support or assistance, direct or indirect, to any individuals in further pursuit of the lawsuit entitled *Moore et al. v. ALPA*, Civil Action No. H-85-3608 (S.D. Tex.) (fines), other than payment of attorney fees and costs accrued for work performed to the date of this Order and Award which are approved by the Bankruptcy Court. ALPA will withdraw any and all claims and charges it has filed against Continental, its employees or affiliates with any Federal, State or Local government agency. (See Litigation Attachment #B.)

IV. *Non-Recognition*

This Order and Award shall not constitute express or implied recognition of ALPA by Continental as the prospective collective bargaining representative of Continental pilots, and shall not affect the right of any party to recourse before the National Mediation Board for such action as may be appropriate.

V. *Dispute Resolution Procedure*

Any disputes which may arise concerning the interpretation, or application of the terms of this Order and Award, other than cases which may arise pursuant to paragraph I.A.3. or I.B.8(b) of this Order and Award, may be submitted by the affected pilot in writing to the Company. If the dispute is not satisfactorily resolved within five (5) days, the affected pilot may submit the dispute forthwith to the Bankruptcy Court as an adversary proceeding.

Disputes which arise pursuant to Paragraphs I.A.3. or I.B.8.(b) of this Order and Award may likewise be submitted by the affected pilot in writing to the Company.

If the dispute is not satisfactorily resolved within five (5) days, the affected pilot may submit the dispute forthwith to arbitration for final and binding decision. The case shall be heard and decided by one arbitrator to be selected by the alternate striking method from a panel of five (5) names (each of whom shall be a member of the National Academy of Arbitrators) to be provided by the American Arbitration Association upon request of the affected pilot. A coin toss shall be used to determine which party strikes first. The parties expressly agree to select the arbitrator within three (3) days of receipt of the panel provided by the American Arbitration Association. Said arbitration shall commence within forty-five (45) days of the selection of the arbitrator. Any resulting arbitration award shall be subject to enforcement or review in the Bankruptcy Court.

The affected pilot(s) may appear or participate in the dispute resolution process in the Bankruptcy Court or in arbitration by any personal representative of his choice.

The provisions of this Section do not apply to the interpretation or application of the Pilot Employment Policy, the Pilot Scheduling Manual or Company Policy, all of which remain beyond the jurisdiction of this procedure.

VI. *Continuing Jurisdiction and Expiration Date.*

The Bankruptcy Court shall retain jurisdiction, both pending plan confirmation, and post-confirmation, to enforce the terms of this Order and Award. The provisions of this Order and Award shall expire no later than the date on which the last returning striker assumes a Captain position at Continental Airlines. Entered this 31st day of October, 1985, at Houston, Texas, pursuant to the procedural agreement of the parties on the record.

/s/

T. GLOVER ROBERTS
United States Bankruptcy
Judge

LITIGATION ATTACHMENT

All pending Litigation to be dismissed with prejudice, including, but not limited to:

1. *Continental Airlines Corp., et al. v. Air Line Pilots Association, et al.*, Br. Consolidated Case No. 83-04019-H2-5, Adversary Proceeding No. 83-2386-H3 (Bank. S.D. Tex.).
2. *Air Line Pilots Association v. Continental Air Lines, Inc.*, Civil Action No. H-83-6196 (S.D. Tex.); Adversary Proceeding No. 83-2455-H1.
3. *Continental Airlines Corp., et al. v. Air Line Pilots Association, et al.*, (Br. Consolidated Case 83-04019-H2-5, (Bankr. S.D. Tex.)). ALPA to withdraw any and all motions and appeals, including:
 1. Motion to dismiss
 2. Motion to reject contract
 3. CAL motion to pay pre-petition wages to non-returnees
 4. CAL motion to terminate insurance benefits
 5. CAL motion to implement stock ownership program
 6. CAL motion to pay law firms representing disciplined employees
4. *Air Line Pilots Association v. Texas International Airlines Inc.*, Civil Action No. H-81-2200 (S.D. Tex.); No. 83-2272 (5th Cir.). Vacate the District Court's judgment. ALPA to withdraw its grievance in the underlying controversy.
5. *Texas Air Corp. v. Air Line Pilots Association*, Civil Action No. H-84-530 (S.D. Tex.), Adversary Proceeding No. 84-0228H1. ALPA to withdraw with prejudice its

request for arbitration and waive all claims arising under the TAC-ALPA Side Letter.

6. *Continental Air Lines Corp. v. Air Line Pilots Association*, Adversary Proceeding No. 84-0617-H3, Bankr. S.D. Texas. (suit to enjoin TAC arbitration)
7. *Continental Airlines, Inc. v. Air Line Pilots Association, International*, California Superior Court, Los Angeles County No. C-470501.
8. In re New York Air, National Mediation Board File No. CR-5177.
9. *Air Line Pilots Association, International v. Continental Airlines, et al.* Case No. 85-5203 (S.D. Tex.) All claims and counterclaims dismissed.
10. In re Air Line Pilots Association, No. 85-2650 (5th Cir.) (ALPA petition for mandamus).
11. *Air Line Pilots Association, International v. Continental Airlines Corporation et al.*, U.S.D.C. (S.D. Tex.) Civil Action H-85-5675.
12. *Continental Air Lines, Inc. v. ALPA*, Civil Action No. H-84-3069 (S.D. Tex.) (ALPA appeals from Order re mass disciplinary hearings).
13. *Continental Air Lines, Inc. v. ALPA*, Civil Action No. H-83-5979 (S.D. Tex.) (TRO and attorneys fees).
14. *Air Line Pilots Association v. Continental Air Lines, Inc., et al.*, Civil Action No. H-84-1555 (S.D. Tex.) (pension plans).
15. In re *Continental Airlines Corp., et al.*, MBH 85-360 (S.D. Tex.) (Motion for Stay).
16. Grievances. All pending grievances and/or arbitrations shall be treated as settled and dismissed with prejudice except for those grievances relating to terminations for cause which are subject to arbitration pursuant to Section I.A.3.

17. Pending litigation between ALPA and Continental in Great Britain shall be treated as settled and dismissed with prejudice provided that a mechanism for the enforceability of this Order is available.

18. Pending litigation in Australia shall be treated as settled and dismissed with prejudice provided adequate retractions are provided.

Attachment C
October 31, 1985

Terms For An Order On
Consent With Respect To
The Pilots' Pension Plans

A Plan

1. The Continental Air Lines, Inc. ("CAL") Fixed Pension Plan For Pilots (the "A Plan") be, and it hereby is, rejected and terminated effective immediately prior to the commencement of the Chapter 11 case on September 24, 1983, in accordance with the amendment to the CAL Plan dated March 9, 1984, to the extent not inconsistent with this Order.

2. *Open Issue* In order to effectuate the orderly winding up of the A Plan including an orderly distribution of the A Plan's assets as soon as possible, CAL shall continue to administer the A Plan and its assets for the purposes thereafter set forth and shall take the actions hereinafter provided to be taken, provided that CAL shall notice pilot participants and involve the Benefits Board in making decisions relating to the Plan.

3. CAL shall take all steps necessary to obtain from the Internal Revenue Service ("IRS") a determination that the termination of the A Plan does not adversely affect the qualification of the Plan, the application for which has been submitted to the IRS by CAL.

4. The A Plan shall be deemed technically amended in a manner satisfactory to CAL and ALPA, to the extent not previously amended, providing for, among other things:

(a) Full vesting for each participant who did not have a severance of employment prior to September 24, 1983.

(b) In the event of the death of a participant prior to March 9, 1984, payment of the same death benefit as would have been payable under the A Plan prior to its amendment on March 9, 1984.

(c) Continuation of the A Plan's provisions concerning distributions on termination of employment, so that any participant who terminates before the date an annuity is purchased pursuant to paragraph "6" of this Order will receive his distribution (as vested under this Order) under such provisions, subject to any elections he may make pursuant to clause (d), below.

(d) An option for participants who have terminated employment to defer receipt of the distribution of the certificates under the annuity contract to be purchased pursuant to paragraph 6 and of benefits payable under the A Plan until the distribution of benefits under the Continental Air Lines, Inc. Variable Pension Plan for Pilots (the "B Plan").

(e) Automatic consent of CAL to early retirement for all participants upon reaching age 45, provided they have terminated employment.

(f) Technical compliance with the provisions for qualified plans under Section 401 of the Internal Revenue Code.

5. CAL shall provide the proper option forms to the Plan participants within 30 days of the date of the entry of this Order.

6. *Open Issue* Full distribution to Plan participants as a result of the termination of the A Plan shall be made by the purchase of an annuity contract, and distribution of individual certificates under the contract, pursuant to the September 11, 1985 proposal from Prudential Insurance Company of America or any similar proposal by an insurance company acceptable to CAL and the Benefits Board except that lump sum payments will be made for benefits with a present value of less than \$3,500 based on the 1984 Unisex Pension mortality table and PBGC interest rates used for valuing annuities under terminating plans as of the first day of the calen-

dar quarter preceding the date of distribution of the lump sums, except as otherwise may be required by the PBGC. The benefit payment options under the A Plan will be preserved under current terms and will be calculated using an 8% interest rate and the 1984 Unisex Pension mortality table. In addition, in the event of the death of a participant prior to the commencement of the payment of a retirement benefit under the annuity, the only death benefit payable (which shall be payable at no cost to the participant) shall be 50% survivor benefit payable (to the participant's spouse, if married, or beneficiary is not married or if the spouse waives the death benefit) on or after the date the participant would have attained age 45.

(i) if a participant is married assuming the participant retired on the day before his death and elected a joint and 50% survivor benefit, and

(ii) if a participant is not married, assuming the participant was married with a spouse two years younger than the participant, the participant retired on the day before his death and elected a joint and 50% survivor benefit.

7. *Open Issue* The Benefits Board will remain intact with pilot representation and the pilot members will have joint signatory authority with CAL over release of benefit payment statements until annuities are purchased and in effect.

8. Any reversion (excess assets after purchase of the aforementioned annuity contract) upon termination of the A Plan will be paid to CAL.

9. Additional amounts shall be distributed from the A Plan to any participant or beneficiary to whom a distribution has been made since September 24, 1983 on a less than fully vested basis, within 30 days after the date of entry of this Order in an amount equal to the

difference between the distribution previously received and that which would have been received based upon the vesting provisions of this Order.

10. Upon entry of this Order, ALPA shall take such action as is appropriate to request a stay of that portion of *Air Line Pilots Association, International v. Continental Air Lines, Inc.*, Civ. Action No. H-84-1555, pending in the United States District Court for the Southern District of Texas, that relates to the A Plan, and upon the purchase of the annuity contract provided in paragraph "6" of this Order, ALPA shall take the appropriate steps to obtain the dismissal of such action that relates to the A Plan (with respect to all defendants in such action), all such action to be subject to the approval and direction of the United States District Court for the Southern District of Texas.

11. CAL shall be, and it hereby is, authorized and empowered to execute and deliver any documents, including, without limitation, the execution and delivery of documents memorializing and effectuating the provisions of paragraph "4" of this Order to the extent such provisions have not previously been made part of the A Plan and to take any further actions as may be necessary to effectuate the rejection and termination of the A Plan and the provisions of the Order as hereinabove provided.

12. In the event that distributions already made to participants who have terminated employment since the date of the Chapter 11 petition were calculated erroneously, giving such participants more than their proper share of the existing Plan funds, CAL or the Benefits Board shall have the right to seek further relief to insure equitable treatment of all Plan participants.

13. In the event a participant in the A Plan dies between March 9, 1984 and the first date benefits are paid out to any participant under the annuity contract referred to in paragraph 6 above, CAL shall pay to the

participant's beneficiary an amount equal to the difference between the death benefit payable under the A Plan prior to amendment on March 9, 1984 and the death benefit payable under the Plan as so amended.

14. The terms of the Plan shall not be further amended without the consent of ALPA, except as provided by this Order or as is necessary to retain its qualified status.

TXI Plan

1. The Texas International Airlines, Inc. Fixed Pension Plan for Pilots ("TXI Plan") be and it is rejected effective immediately prior to the commencement of the Chapter 11 case on September 24, 1983, provided that the TXI Plan shall not be terminated but shall be considered frozen effective as of September 24, 1983, as provided in an amendment of the TXI Plan dated March 9, 1984, to the extent not inconsistent with this Order.

2. CAL shall continue to administer the TXI Plan and its assets for the purposes hereafter set forth and shall take the actions hereafter provided to be taken, provided that CAL shall continue to comply with the terms of the Plan providing for notice to ALPA and the involvement of ALPA in making decisions relating to the Plan.

3. The TXI Plan shall be deemed technically amended in a manner satisfactory to CAL and to ALPA, to the extent not previously amended, providing for, among other things:

(a) Full vesting, for all participants who did not have a severance of employment prior to September 24, 1983, of all benefits accrued as of that date.

(b) Participants who were 40 years of age or older on September 24, 1983 will be eligible for subsidized early retirement benefits (using a 3% reduction in benefits for each year of benefit payments prior to age 60) upon termination of employment. Participants under 40 years of age on September 24, 1983 will be eligible for early retirement benefits upon termination of employment at age 42 (using a reduction in benefits for each year of benefits prior to age 60, based on an 8.5% per annum interest rate and the 1985 Group Annuity table). No benefit shall commence prior to the first day of the second month following the entry of the Order.

(c) Upon the death of any participant prior to March 9, 1984, the same death benefit shall be paid as would have been payable under the TXI Plan prior to its amendment on March 9, 1984.

4. The Plan shall not be amended, except as provided by this Order or as is necessary to retain its qualified status, without the consent of ALPA.

5. CAL may, at its option, provide for any benefits due under this Order, with regard to the participants in the TXI Plan, through a separate tax qualified plan which would be subject to the approval of ALPA.

6. Additional amounts shall be distributed from the Plan to any participant or beneficiary to whom a distribution has been made since September 24, 1983 on a less than fully vested basis, within 30 days after the date of entry of this Order in an amount equal to the difference between the distribution previously received and that which would have been received based upon the vesting provisions of the Order.

7. *Open Issue.* The Pension Committee will remain intact with pilot representation, and the Pension Committee will have joint signatory authority with Continental over release of benefit payment statements.

8. CAL shall fund the TXI Plan, and any alternate plan established pursuant to paragraph 6 of this Order, at a level not less than level annual payments that will fully amortize the cost of all benefits no later than December 31, 1995, using an assumed 11% interest rate and the 1985 Group Annuity table.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-86-1718

JOSEPH E. O'NEILL, *et al.*,
vs. *Plaintiffs,*

AIRLINE PILOTS ASSOCIATION INTERNATIONAL; CONTINENTAL AIRLINES MASTER EXECUTIVE COUNCIL; HENRY A. DUFFY; DENNIS M. HIGGINS; D. KIRBY SCHNELL; R. PETER LAPPIN and DONALD A. HENDERSON,
Defendants.

Complaint for Violation of Railway Labor Act
(20 U.S.C. § 141, *et seq.*);
Labor-Management Reporting and Disclosure
Act (29 U.S.C. § 401, *et seq.*); and State
Common Law Breach of Contract

FIRST AMENDED COMPLAINT

JURY IS DEMANDED

Upon personal knowledge or information and belief,
Plaintiffs allege:

INTRODUCTION

1. Plaintiffs are past and present Continental Airlines, Inc. pilots, and bring these claims against their union and various officers for: (1) breach of the duty of fair representation which Defendants owed to Plaintiffs under the Railway Labor Act; (2) violation of Plaintiffs' voting rights guaranteed under § 101(a)(1) of The Labor-

Management Reporting and Disclosure Act; (3) breach of fiduciary duties which Defendants owed to Plaintiffs under § 501 of the Labor-Management Reporting and Disclosure Act; (4) state common law breach of contractual obligations which Defendants owed to Plaintiffs. Plaintiffs seek leave of Court to bring their claims under § 501 of The Labor-Management Reporting and Disclosure Act; and both compensatory and punitive damages for their claims.

JURISDICTION AND VENUE

2. This Court has jurisdiction to hear these claims pursuant to § 301 of the National Labor Relations Act, 29 U.S.C. § 141, *et seq.*; § 102 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401, *et seq.*; 28 U.S.C. § 1337; and its jurisdiction to hear state law claims arising from the same common nucleus of operative facts as Plaintiffs' federal law claims.

3. Venue properly lies in this Court pursuant to § 102 of the Labor-Management Reporting and Disclosure Act and 28 U.S.C. § 1391.

4. Defendants caused events to occur in the Southern District of Texas out of which Plaintiffs' claims arise.

PARTIES

5. Plaintiffs are past or present Continental Airlines Corporation ("Continental") pilots and were represented by the Airline Pilots Association, International at all times from September 24, 1984, through October 31, 1985.

6. Airline Pilots Association, International ("ALPA") is an unincorporated association organized for the purposes and objectives of a labor organization. ALPA is a "representative" within the meaning of the Railway Labor Act, 45 U.S.C. § 141, *et seq.* and the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401,

et seq. ALPA has its principal office at 535 Herndon Parkway, Herndon, Virginia.

7. Continental Airlines Master Executive Council ("CAL MEC") was the coordinating body of ALPA for Continental pilots. CAL MEC consisted of the officers of the three local councils established by ALPA for Continental pilots. CAL MEC is currently under trusteeship by ALPA, and has an office at 1560 Drummett Boulevard, Houston, Texas.

8. Henry A. Duffy is a resident of Washington, D.C. or Georgia, and maintains his home office and residential mailing address at 535 Herndon Parkway, Herndon, Virginia. Duffy was ALPA's President at all times relevant hereto. Duffy was present in the Southern District of Texas in connection with the Continental strike at various times from September 24, 1983, through October 31, 1985; and at various other times issued instructions and caused events to occur in the Southern District of Texas through telephone calls and other communications thereto.

9. Dennis M. Higgins resides at 25515 Long Hill Lane, Spring, Texas, and at the times relevant hereto was the chairman and chief spokesperson for CAL MEC. Higgins also currently is CAL MEC's trustee. Higgins was present in the Southern District of Texas in connection with the Continental strike at various times from September 24, 1983, through October 31, 1985, and negotiated the secret agreement with Continental alleged herein within the Southern District of Texas.

10. D. Kirby Schnell resides at 6928 La Cadana, El Paso, Texas, and at the times relevant hereto was the chief negotiator for CAL MEC. Schnell was present in the Southern District of Texas in connection with the Continental strike at various times from September 24, 1983, through October 31, 1985, and negotiated the secret agreement with Continental alleged herein within the Southern District of Texas.

11. R. Peter Lappin is a resident of California and maintains his residential mailing address at P.O. Box 9460, Marina Del Rey, California. Lappin was the vice-chairman of CAL MEC at the times relevant hereto, and involved in the negotiations between CAL MEC and Continental. Lappin was present in the Southern District of Texas in connection with the Continental strike at various times from September 24, 1983, through October 31, 1985, and negotiated the secret agreement with Continental alleged herein within the Southern District of Texas.

12. Donald A. Henderson resides at 280 Bellingrath Park, Conroe, Texas, and at the times relevant hereto was involved in the negotiations for CAL MEC. Henderson was present in the Southern District of Texas in connection with the Continental strike at various times from September 24, 1983, through October 31, 1985, and negotiated the secret agreement with Continental alleged herein within the Southern District of Texas.

CLASS ACTION

13. Plaintiffs bring this action pursuant to Rule 23, Federal Rules of Civil Procedure, as a class action on behalf of the class of all Continental pilots who withdrew their services from Continental at any time from October 1, 1983, through October 31, 1985, and who were not working for Continental on October 31, 1985.

14. The members of the class are in a similar position to that alleged herein by the named Plaintiffs. The size of the class is believed to range from a minimum of three hundred to a maximum of thirteen hundred, and is such that joinder of even the minimum possible number of all class members is impracticable.

15. The claims of the named Plaintiffs and other class members involve common questions of law and fact which predominate over any questions affecting only individual

members of the class, and this class action is superior to other available methods for the fair and efficient adjudication of the controversy herein described.

16. The claims of the named Plaintiffs are typical of the claims of the class, and the named Plaintiffs will fairly and adequately protect the interests of this class.

GENERAL ALLEGATIONS

17. ALPA has been the exclusive collective bargaining representative under the Railway Labor Act for all Continental pilots since 1940. ALPA has negotiated numerous collective bargaining agreements with Continental during those many years. The most recent such agreement was entered into between Continental and ALPA in 1982.

18. On or about September 24, 1983, Continental filed bankruptcy and ceased abiding by its collective bargaining agreement with ALPA.

19. On or about October 1, 1983, ALPA commenced a strike against Continental and withdrew its members' services from Continental.

20. ALPA's strike was effectively terminated on October 31, 1985, as a result of an order issued by Bankruptcy Judge Roberts on that same date. Judge Roberts' order was based upon a secret agreement reached between the Defendants and Continental on or before October 31, 1985.

21. Defendants Duffy, Higgins, Schnell, Lappin and Henderson acted in the manner alleged throughout this complaint under color of authority given to them by ALPA and CAL MEC. Each of the Defendants was, at all times relevant to this Complaint, the agent, servant, representative or employee of every other Defendant and acting with the knowledge, consent and permission of every other Defendant.

22. Plaintiffs have no administrative or intra-union remedies sufficient to provide them the relief requested in this Complaint.

COUNT ONE

(Breach of Duty of Fair Representation)

23. Plaintiffs reallege and incorporate each and every allegation of the Complaint as if fully set forth in this Count.

24. ALPA was the exclusive representative of the Continental pilots, including all Plaintiffs, under the Railway Labor Act, 29 U.S.C. § 141 *et seq.*, at all times relevant hereto. CAL MEC was ALPA's coordinating body for the Continental pilots, including all Plaintiffs, at all times relevant hereto. In these capacities, ALPA and CAL MEC owed a duty of fair representation to all Continental pilots, including all Plaintiffs, at all times relevant to this Complaint.

25. During the course of the Continental strike, ALPA initiated numerous court claims (the "litigation") against Continental on behalf of all Continental pilots, including Plaintiffs. Without limitation, this litigation included: (1) unfair labor practice claims against Continental which, if successful, would have guaranteed every striking Continental pilot, including Plaintiffs, the opportunity to return to work at Continental in order of seniority and without loss of pay; (2) attempts to enforce a side-letter agreement reached between ALPA and Continental's corporate parent, Texas Air Corporation ("TAC") for the benefit of ALPA's members which, if successful, would have guaranteed payment to all striking Continental pilots, including Plaintiffs, of the wages and benefits they lost when Continental ceased operating under its collective bargaining agreement with ALPA; (3) a civil RICO suit alleging that Continental and others fraudulently schemed to avoid Federal Air Regulations in order to gain an unfair bargaining advantage over ALPA.

during the Continental strike which, if successful, would have awarded all Continental pilots, including Plaintiffs, treble their actual damages suffered as a result of those schemes; (4) an appeal seeking to dismiss Continental's bankruptcy as having been filed in bad faith; and (5) an appeal seeking to reverse the Bankruptcy Court's order authorizing Continental to reject its collective bargaining agreement with ALPA.

26. From the inception of the Continental strike, ALPA guaranteed all Continental pilots its unfaltering support in reaching an agreement with Continental that would protect all pilot's seniority. ALPA reaffirmed this pledge throughout the strike, and correctly recognized that seniority was the top bargaining priority of its members.

27. Throughout the strike, ALPA also guaranteed its unfaltering support of all litigation it filed against Continental and TAC. ALPA expressly recognized that it filed these claims on behalf of its Continental pilot members, and that litigation was the only means available to secure valuable rights for those members.

28. ALPA had the support of a large majority of its pilots, not just those employed by Continental, for the Continental strike and ALPA's stated bargaining goals. ALPA's membership authorized ALPA to assess each pilot an amount sufficient to provide strike benefits to each Continental pilot through the duration of the Continental strike.

29. In September 1985, CAL MEC held an important meeting in Washington, D.C., pertaining to the Continental strike. At that meeting, Higgins, on instructions from ALPA President Duffy, attempted to persuade CAL MEC to end its strike against Continental. CAL MEC, however, acting on behalf of all Continental pilots, voted to continue the strike and reaffirmed the importance of reaching an agreement that protected each pilot's seniority before terminating the strike.

30. Also at the September meeting in Washington, D.C., CAL MEC discussed and mapped out its negotiating strategy. CAL MEC resolved that it would continue the strike, and authorized Higgins and Schnell as its bargaining representatives to continue negotiations with Continental. CAL MEC expressly instructed Higgins and Schnell not to reach an agreement unless such agreement protected all pilots' seniority and allowed ALPA, on behalf of the Continental pilots, to continue the litigation against Continental and TAC. CAL MEC further instructed Higgins and Schnell not to appoint Judge Roberts to arbitrate any unresolved issues. Lappin and Henderson thereafter participated in and supported the negotiations with Continental in concert with Higgins and Schnell. Hereinafter, the "negotiating team" refers to Higgins, Schnell, Lappin and Henderson.

31. In late October 1985, and perhaps before that time, ALPA or its representatives reached a secret agreement with Continental to settle the strike. This secret agreement eliminated the pilots' seniority rights and dismissed with prejudice all ALPA litigation against Continental and TAC. The ALPA representatives and Continental further agreed to present their secret agreement to Judge Roberts as an interest arbitrator for his rubber-stamp approval, rather than submitting the proposal to CAL MEC or to the Continental pilots for a vote.

32. Sometime thereafter, ALPA directed the negotiating team to adopt the secret agreement between ALPA and Continental. Duffy told the negotiating team that he would place CAL MEC in trusteeship and terminate the Continental strike if they did not approve this agreement. The negotiating team thereafter did so without ratification by CAL MEC or the Continental pilots.

33. ALPA's secret agreement with Continental, as adopted by the negotiating team, divested the pilots of their seniority rights, and may prejudice their rights pur-

sued in the litigation against Continental and TAC. Among other things, the agreement: (1) required pilots to waive claims against Continental and TAC in order to preserve their right to be recalled in seniority order; (2) discriminated in favor of nonstriking pilots and against recalled striking pilots in the award of future captain vacancies regardless of seniority; (3) discriminated against returning strikers by restricting their seniority rights to bid for assignments of initial status equipment and base; (4) discriminated against pilots who elected to retain their contractual claims against Continental and TAC by allowing them to be recalled only after pilots who waived their claims, regardless of seniority; (5) continued strike benefits, prior to recall, only to pilots who waived all claims against Continental and TAC; (6) terminated recall rights after December 31, 1988; and (7) eliminated recall rights of retired and resigned Continental pilots and restricted the recall rights of disabled pilots. The secret agreement also violated CAL MEC's right to consider any strike settlement agreement, and the Continental pilots' right to vote on its ratification by appointing Judge Roberts to order its terms as an interest arbitrator.

34. Duffy orchestrated the secret agreement with Continental in order to terminate the strike against Continental and strengthen his political position as President of ALPA; and also in order to protect his personal interests in avoiding any potential personal liability in civil RICO claims that Continental filed against ALPA. Higgins approved the agreement based upon its inclusion of a provision that changed the Continental pilots' retirement age and status for his personal benefit. Schnell approved the agreement based upon its inclusion of severance pay to certain pilots on conditions beneficial to him.

35. ALPA, CAL MEC, Duffy, and the negotiating team all acted beyond the authority conferred upon them

by ALPA's membership to negotiate a settlement, and contrary to the best interests of all Continental pilots. Defendants' conduct in reaching the secret agreement with Continental and presenting it to Judge Roberts for his order was arbitrary, discriminatory, and motivated by bad faith. Defendants thus breached the duty of fair representation they owed to all Continental pilots, including Plaintiffs, in violation of the Railway Labor Act.

36. Sometime since October 31, 1985, ALPA has distributed new union membership cards to some of its Continental pilot members. ALPA has refused, however, to issue new membership cards to others of its Continental pilot members, including many of these Plaintiffs. ALPA thereby has acted arbitrarily, discriminatorily and in bad faith to deny to some of its members, including Plaintiffs, the privileges and benefits of union membership which ALPA has extended to others of its members. ALPA thus has further breached the duty of fair representation it owes to all its members, including Plaintiffs.

37. Plaintiffs have been damaged by Defendants' breaches of their duty of fair representation in a manner and in amounts which will be proven at trial.

COUNT TWO

(Violation of the
Labor-Management Reporting and
Disclosure Act, 49 U.S.C. § 411,
et seq.)

38. Plaintiffs reallege and incorporate each and every allegation of the Complaint as if fully set forth in this Count.

39. Section 101 of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411, sets forth the labor "Bill of Rights" that applies to all em-

ployees, such as Plaintiffs, who are represented by unions, such as ALPA. Among these rights, the LMRDA guarantees union members the right to vote on collective bargaining agreements where their union constitutions so provide.

40. ALPA's Constitution and By-Laws ("Constitution") provides that "the conclusion of an agreement shall, at the discretion of the individual Master Executive Counsel, be subject to ratification." ALPA Constitution and By-Laws at Article XVIII, Section 2, page 58. CAL MEC, in turn, resolved in September 1983 to grant all Continental pilots the right to ratify all agreements with Continental.

41. Defendants reached a secret strike settlement agreement with Continental without allowing Continental pilots to vote on ratification. Defendants thereby denied all Continental pilots, including Plaintiffs, valuable rights expressly guaranteed to them by ALPA and CAL MEC, and protected by the LMRDA. Defendants acted intentionally, recklessly, and in wanton disregard of the Continental pilots' rights under ALPA's Constitution and the LMRDA in denying them their right to a ratification vote.

42. Plaintiffs have been damaged by Defendants' conduct in a manner and in amounts which will be proven at trial. These damages include, without limitation, the loss of their valuable seniority rights and the potential dismissal with prejudice of all litigation which ALPA filed on their behalf against Continental and TAC. Plaintiffs are entitled to be compensated by Defendants for these damages, and are further entitled to an award of punitive damages against Defendants in an amount sufficient to deter them and others similarly situated from violating the LMRDA and depriving employees of their rights thereunder in the future.

COUNT THREE

(Breach of Fiduciary Duty in
Violation of Labor-Management
Reporting and Disclosure Act, 29
U.S.C. § 411 *et seq.*)

43. Plaintiffs reallege and incorporate each and every allegation of their Complaint as if fully set forth in this Count.

44. Section 501 of the LMRDA imposes fiduciary duties on unions and union representatives in all dealings with and on behalf of union members. Defendants therefore owed fiduciary duties to Plaintiffs in their negotiations with Continental and in all related activities.

45. Beginning in early summer 1985, ALPA or its representatives met secretly with representatives of Continental to negotiate a strike settlement agreement. ALPA breached its fiduciary duties to all Continental pilots by failing to report the occurrence of these secret meetings and the subject of their discussions to them or to CAL MEC.

46. Sometime after ALPA's secret meetings with Continental, Duffy breached his fiduciary duties to all Continental pilots by, among other things, threatening to place CAL MEC in trusteeship if its negotiators failed to approve and finalize ALPA's secret agreement with Continental.

47. Sometime prior to October 1985, CAL MEC, on behalf of all Continental pilots, charged Defendants Higgins and Schnell with the duty to negotiate a strike settlement agreement that would preserve all Continental pilots' seniority rights and all litigation filed against Continental and TAC, and that did not leave issues to be arbitrated by Judge Roberts. CAL MEC, on behalf of all Continental pilots, also charged Higgins and Schnell with responsibilities to report all negotiations and potential agree-

ments to CAL MEC. Defendants Higgins and Schnell were obligated by the LMRDA to discharge these negotiating duties as fiduciaries of all Continental pilots. Lappin and Henderson assumed these same fiduciary obligations through their participation in the negotiations with Continental.

48. The negotiating team breached its fiduciary duties to the Continental pilots, including Plaintiffs, by: (1) meeting secretly with Continental and Judge Roberts in attempts to settle the Continental strike on terms contrary to those approved by CAL MEC and its members; (2) reaching a secret agreement that terminated the Continental pilots' seniority rights and that attempted to dismiss with prejudice all litigation ALPA filed on their behalf against Continental and TAC; (3) failing to report negotiations to CAL MEC, on behalf of all Continental pilots; (4) presenting their secret agreement to Judge Roberts as an interest arbitrator; and (5) conspiring to deprive the Continental pilots of their right to ratify any strike settlement agreement. ALPA and CAL MEC breached their fiduciary duties to the Continental pilots, including Plaintiffs, by knowingly or negligently allowing the negotiating team to engage in such conduct under color of their authority.

49. All Defendants further breached their fiduciary duties to the Continental pilots, including Plaintiffs, by failing to disclose the full meaning and ramifications of the agreement which was embodied in Judge Roberts' October 31, 1985, order in a manner sufficient to allow each Continental pilot to understand its terms and make important decisions required thereunder in an informed manner.

50. ALPA breached its fiduciary duties by arbitrarily placing CAL MEC in trusteeship in early November 1985, and thereby depriving all Continental pilots of any viable means to protest Defendants' bargaining behavior, or to

understand and exercise their rights under Judge Roberts' Order.

51. Plaintiffs have been damaged by Defendants' breaches of the fiduciary duties owed to them, in a manner and amounts which will be proven at trial. Plaintiffs are entitled to be compensated by Defendants for these damages; and are further entitled to an award of punitive damages against Defendants in an amount sufficient to deter them and others similarly situated from breaching their fiduciary duties to union members under the LMRDA in the future.

52. Plaintiffs seek leave of Court, for good cause as alleged in this verified Complaint, to pursue their claims against Defendants for breach of fiduciary duty pursuant to § 501 of the LMRDA.

COUNT FOUR

(Breach of Contract/Tortious
Breach of Contract)

53. Plaintiffs reallege and incorporate each and every allegation of their Complaint as if fully set forth in this Count.

54. ALPA's Constitution imposes contractual obligations between ALPA and its members, including all Continental pilots. CAL MEC's governing documents similarly impose contractual obligations between CAL MEC and all Continental pilots.

55. ALPA's Constitution expressly guarantees all pilots the right to ratify all agreements if their respective Master Executive Councils so provide. CAL MEC expressly promised Continental pilots the right to ratify all agreements with Continental.

56. ALPA's Constitution expressly provides that minutes and records of attendance must be kept at all meet-

ings of every Master Executive Counsel, including CAL MEC.

57. ALPA's and CAL MEC's contractual obligations to all Continental pilots, including Plaintiffs, contained an implied covenant of good faith and fair dealing.

58. ALPA and CAL MEC breached their contractual obligations to the Continental pilots, including Plaintiffs, by not allowing them to vote on the agreement reached with Continental. Both ALPA and CAL MEC also breached the implied covenant of good faith and fair dealing which they owed to all Continental pilots, including Plaintiffs, by this same conduct.

59. CAL MEC breached its contractual obligations to the Continental pilots, including Plaintiffs, by failing to keep minutes of all meetings, which in turn deprived them of adequate notice and information regarding the collective bargaining negotiations with Continental.

60. Plaintiffs have been damaged by Defendants' contractual breaches, in a manner and in amounts to be proven at trial.

61. ALPA and CAL MEC breached their contractual obligations to the Continental pilots willfully, intentionally, in bad faith and, therefore, tortiously. Plaintiffs thus also are entitled to an award of punitive damages against Defendants in an amount sufficient to deter them and others similarly situated from such tortious conduct in the future.

WHEREFORE, Plaintiffs individually and as a class request the following relief:

- A. Leave of Court to bring this action against Defendants, pursuant to § 501 of the Labor-Management Reporting and Disclosure Act;
- B. Judgment in an amount sufficient to compensate Plaintiffs for all damages suffered as a result of Defendants' conduct alleged in Counts 1-4;

- C. Judgment in an amount sufficient to deter Defendants and others similarly situated from the conduct alleged in Counts 2-4;
- D. An award of all attorneys' fees Plaintiffs have incurred to bring these claims;
- E. An award of all costs Plaintiffs have incurred to bring these claims; and
- F. All other relief which the Court deems just and proper.

RESPECTFULLY SUBMITTED this — day of May, 1986.

LEWIS AND ROCA

By _____

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Ste. 2300
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85003-0000
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LEONARD KOEHN HURT
SCHWEINLE STRAWN &
INGOLDSBY

By _____

WILLIAM E. SCHWEINLE, JR.
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State Bar #2190550
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(713) 661-3488

STATE OF ARIZONA)
) ss. VERIFICATION
 County of Maricopa)

JACK E. PENDLETON, being first duly sworn upon his oath, deposes and says:

That is a former pilot for Continental Airlines, Inc.; that he was a member in good standing of, and represented by, the Airline Pilots Association International and the Continental Airlines Master Executive Council, at all times set forth in the foregoing First Amended Complaint; that he is one of the plaintiffs named in the foregoing First Amended Complaint; that he has read the foregoing First Amended Complaint and knows the contents thereof; that the factual matters alleged therein are true and correct based upon his personal knowledge or his information and belief; that as to those factual matters alleged upon personal information and belief, he believes them to be true; and that he makes the legal conclusions alleged therein upon advice of counsel.

 JACK E. PENDLETON

SUBSCRIBED AND SWORN to before me this ____
 day of May, 1986.

 Notary Public

My Commission
 Expires:

STATE OF ARIZONA)
) ss. VERIFICATION
 County Of Maricopa)

PHILIP M. ORDWAY, being first duly sworn upon his oath, deposes and says:

That he is a former pilot for Continental Airlines, Inc.; that he was a member in good standing of, and represented by, the Airline Pilots Association International and the Continental Airlines Master Executive Council, at all times set forth in the foregoing First Amended Complaint; that he is one of the plaintiffs named in the foregoing First Amended Complaint; that he has read the foregoing First Amended Complaint and knows the contents thereof; that the factual matters alleged therein are true and correct based upon his personal knowledge or his information and belief; that as to those factual matters alleged upon personal information and belief, he believes them to be true; and that he makes the legal conclusions alleged therein upon advice of counsel.

PHILIP M. ORDWAY

SUBSCRIBED AND SWORN to before me this ____
 day of May, 1986.

Notary Public

My Commission
 Expires:

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-86-1718

JOSEPH E. O'NEILL, *et al.*,
vs. *Plaintiffs,*

AIRLINE PILOTS ASSOCIATION INTERNATIONAL; CONTI-
NENTAL AIRLINES MASTER EXECUTIVE COUNCIL;
HENRY A. DUFFY; DENNIS M. HIGGINS; D. KIRBY
SCHNELL; R. PETER LAPPIN and DONALD A. HENDER-
SON, *Defendants.*

ANSWER

Defendants, by their attorneys, Mudge Rose Guthrie Alexander & Ferdon, for their answer to the First Amended Complaint herein (the "complaint"), allege as follows:

1. Deny the allegations contained in paragraph 1 of the complaint, except to state that plaintiffs have filed a complaint purporting to allege those claims described in said paragraph 1.
2. Deny the allegations contained in paragraphs 2, 3, and 4 of the complaint.
3. Deny the allegations contained in paragraph 5 of the complaint except to state that plaintiffs are past or present Continental Airline Corporation ("Continental") pilots.
4. Deny the allegations contained in paragraph 6 of the complaint except to state that the Air Line Pilots Association, International ("ALPA") is an unincorporated

association organized for the purposes and objectives of a labor organization, that ALPA is a "representative" within the meaning of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, and that ALPA has its principal office at 535 Herndon Parkway, Herndon, Virginia.

5. Deny the allegations contained in paragraph 7 of the complaint except to state that the Continental Airlines Master Executive Council ("CAL MEC") was the coordinating body of ALPA for Continental pilots.

6. Deny the allegations contained in paragraph 8 of the complaint except deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in the last clause of paragraph 8 of the complaint and except to state that Defendant Duffy is a resident of the State of Georgia, that he has been president of ALPA since January 1, 1983 and that he was present in the Southern District of Texas in connection with the Continental strike at various times from September 24, 1983 through October 31, 1985.

7. Deny the allegations contained in paragraph 9 of the complaint except admit Defendant Higgins has a residence at the specified address, that he was the chairman of the CAL MEC from October 1983 through November 8, 1985, and that he was present in the Southern District of Texas in connection with the Continental strike at various times from September 24, 1983 through October 31, 1985.

8. Deny the allegations contained in paragraph 10 of the complaint except admit Defendant Schnell has a residence at the specified address, that he was chairman of the committee negotiating with Continental with respect to the Continental strike from June 1, 1985 until the end of that strike and that he was present in the Southern District of Texas in connection with the Continental strike at various times from September 24, 1983 through October 31, 1985.

9. Deny the allegations contained in paragraph 11 of the complaint except admit Defendant Lappin has a residence in California and maintains a mailing address at the specified mailing address, that he was vice chairman of the CAL MEC from March 1981 through November 8, 1985, that he served on the committee negotiating with Continental with respect to the Continental strike and that he was present in the Southern District of Texas in connection with the Continental strike at various times from September 24, 1983 through October 31, 1985.

10. Deny the allegations contained in paragraph 12 of the complaint except admit Defendant Henderson has a residence at the specified address, that he served on the committee negotiating with Continental with respect to the Continental strike and that he was present in the Southern District of Texas in connection with Continental strike at various times from September 24, 1983 through October 31, 1985.

11. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the complaint, except to state that plaintiffs purport to bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedures on behalf of the class defined in said paragraph 13.

12. Deny the allegations contained in paragraphs 14, 15 and 16 of the complaint.

13. Admit the allegations contained in paragraphs 17, 18, and 19 of the complaint.

14. Deny the allegations contained in paragraph 20 of the complaint, except admit that the strike was effectively terminated on October 31, 1985 as a result of an Order and Award issued by Bankruptcy Judge Roberts on that same date and except to further state that said Order and Award included as part thereof certain matters that had been tentatively agreed to between ALPA

and Continental as more fully described in paragraph 25 hereof.

15. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 21 of the complaint except to state that those actions taken by Defendants Duffy, Higgins, Schnell, Lappin and Henderson in connection with the Continental strike and its resolution were properly authorized actions.

16. Deny the allegations contained in paragraph 22 of the complaint.

17. With respect to the allegations contained in paragraph 23 of the complaint, defendants repeat and reallege each and every answer to the complaint as though fully set forth in answer to this paragraph of the complaint.

18. Deny the allegations contained in paragraph 24 of the complaint.

19. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 25 of the complaint except to admit that during the course of the Continental strike, ALPA initiated several legal actions against Continental; and the Court and the parties are respectfully referred to the pleadings in those actions for an accurate description thereof.

20. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 26 of the complaint except to state that ALPA gave its unfaltering support to its member pilots employed by Continental in their efforts to reach an agreement that would, to the extent possible under the circumstances, protect the pilots' seniority, that ALPA reaffirmed this support throughout the strike and that ALPA believed that seniority was a top bargaining priority of its members.

21. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 27 of the complaint except to state that ALPA gave its unfaltering support to the litigation it commenced during the Continental strike.

22. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 28 of the complaint except to state that many in ALPA's membership supported the Continental strike and that the ALPA membership from time to time authorized ALPA to make certain assessments necessary to provide very substantial strike benefits during the Continental strike.

23. Deny the allegations contained in paragraph 29 of the complaint except to state that a meeting of the CAL MEC took place in Washington, D.C., in September, 1985, that a resolution to end the Continental strike was not passed, that a resolution was passed providing, *inter alia*, that a "return to work in order of system seniority is a matter of paramount concern," and that a resolution was passed giving the MEC officers and MEC negotiating committee chairman the authority to reach a resolution with respect to the issues then outstanding in connection with the Continental strike.

24. Deny the allegations contained in paragraph 30 of the complaint except to state that members of CAL MEC discussed at the September meeting certain issues relevant to the Continental strike, that the MEC officers and MEC negotiating committee chairman were authorized to reach a resolution with respect to the issues then outstanding in connection with the Continental strike, and that defendants Lappin and Henderson participated with Higgins and Schnell in the efforts to reach such a resolution.

25. Deny the allegations contained in paragraph 31 except to state that Defendants Higgins, Schnell, Lappin

and Henderson negotiated tentative agreements with Continental as to certain issues, which tentative agreements were subject to an entire agreement being reached, that an entire agreement never was reached between the parties, and that the Order and Award issued by Judge Roberts included as part thereof those matters which had been tentatively agreed to between the parties.

26. Deny the allegations contained in paragraph 32 of the complaint.

27. Deny the allegations contained in paragraph 33 of the complaint except to state that to the extent said paragraph seeks to summarize provisions of Judge Roberts' Order and Award, the Court and the plaintiffs are respectfully referred to the provisions of said Order and Award, as amended, for the terms thereof.

28. Deny the allegations contained in paragraphs 34 through 37 of the complaint.

29. With respect to the allegations contained in paragraph 38 of the complaint, [defendants] repeat and reallege each and every answer to the complaint as though fully set forth in answer to this paragraph of the complaint.

30. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 39 of the complaint in that this paragraph calls for a legal conclusion.

31. Deny the allegations contained in paragraph 40 of the complaint except to state that ALPA's constitution and by-laws contains the language quoted in paragraph 40 of the complaint.

32. Deny the allegations contained in paragraphs 41 and 42 of the complaint.

33. With respect to the allegations contained in paragraph 43 of the complaint, [defendants] repeat and real-

lege each and every answer to the complaint as though fully set forth in answer to this paragraph of the complaint.

34. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 44 of the complaint in that this paragraph calls for a legal conclusion.

35. Deny the allegation contained in paragraph 45 of the complaint except to state that certain representatives of ALPA met with representatives of Continental at various times to negotiate a settlement of the Continental strike.

36. Deny the allegations contained in paragraphs 46 through 52 of the complaint.

37. With respect to the allegations contained in paragraph 53 of the complaint, [defendants] repeat and re-lege each and every answer to the complaint as though fully set forth in answer to this paragraph of the complaint.

38. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 54 of the complaint in that this paragraph calls for a legal conclusion.

39. Deny the allegations contained in paragraph 55 of the complaint except to state that ALPA's constitution and by-laws contains the language quoted in paragraph 40 of the complaint.

40. Admit the allegations contained in paragraph 56 of the complaint.

41. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 57 of the complaint in that this paragraph calls for a legal conclusion, except to state that at all times defendants acted in good faith and dealt fairly with all of ALPA's member pilots.

42. Deny the allegations contained in paragraph 58 through 61 of the complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

43. The complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

44. The claims alleged herein are barred by the applicable statute of limitations.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

45. Plaintiffs' claims are barred by the doctrines of *res judicata* and/or collateral estoppel as a result of the proceedings and orders of the Bankruptcy Court of the Southern District of Texas.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

46. Plaintiffs' claim as set forth in Count III of the complaint has not been properly commenced because plaintiffs failed to satisfy the statutory conditions precedent for commencing such an action.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

47. Plaintiffs' claim as set forth in Counts I, II, and IV may not, as a matter of law, be brought against the individual defendants or CAL MEC.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

48. Plaintiffs' claims as set forth in Count III may not, as a matter of law, be brought against Defendants ALPA or CAL MEC.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

49. Punitive damages, as a matter of law, are not recoverable.

**AS AND FOR AN EIGHTH AFFIRMATIVE
DEFENSE**

50. Plaintiffs' claims may not be maintained against the CAL MEC because the CAL MEC is not a legal person or entity and lacks the capacity to be sued.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

51. This Court lacks jurisdiction over the person of the CAL MEC.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

52. There was insufficient service of process with respect to the CAL MEC in that plaintiffs failed to effect proper service of the summons and complaint upon the CAL MEC.

**AS AND FOR AN ELEVENTH AFFIRMATIVE
DEFENSE**

53. Plaintiffs' claim as set forth in Count IV of the complaint is barred by the doctrine of federal preemption.

**AS AND FOR A TWELFTH AFFIRMATIVE
DEFENSE**

54. Plaintiffs' claims are barred as a result of their having failed to exhaust available internal union remedies.

**AS AND FOR A THIRTEENTH AFFIRMATIVE
DEFENSE**

55. Plaintiffs' claims are barred in that they are a collateral attack on the proceedings, orders and awards of the Bankruptcy Court of the Southern District of Texas and are an improper effort to appeal, modify and challenge those proceedings, orders and awards.

**AS AND FOR A FOURTEENTH AFFIRMATIVE
DEFENSE**

56. Plaintiffs' claims are barred to the extent that those acts which are alleged to be improper were re-

quired by orders issued by the Bankruptcy Court of the Southern District of Texas.

**AS AND FOR A FIFTEENTH
AFFIRMATIVE DEFENSE**

57. Plaintiffs, as individuals, are not entitled to recover damages on account of the claims set forth in Count III of the complaint.

**AS AND FOR A SIXTEENTH
AFFIRMATIVE DEFENSE**

58. To the extent plaintiffs are, or seek to represent, Continental pilots who retired and/or resigned prior to October 31, 1985, plaintiffs lack standing to prosecute the claims alleged in the complaint.

**AS AND FOR A SEVENTEENTH
AFFIRMATIVE DEFENSE**

59. To the extent plaintiffs are, or seek to represent, Continental pilots who retired and/or resigned prior to October 31, 1985, the claims set forth in the complaint are barred under the doctrine of waiver.

WHEREFORE, defendants demand judgment dismissing the complaint herein, together with their costs and disbursements, including their attorneys' fees, and such other and further relief as to this Court seems just and proper.

Dated: New York, New York
July 31, 1986

JED S. RAKOFF
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Certificate of Service

I certify that a true and correct copy of the foregoing Answer was served on counsel for plaintiffs, Reginald H. Wood and William E. Schweinle, Jr., Leonard, Koehn, Hurt, Schweinle, Strawn & Ingoldsby, Suite 150, 6750 West Loop South, Bellaire, Texas 77401, by first-class mail this 31st day of July, 1986.

JOHN A. IRVINE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-86-1718

JOSEPH E. O'NEILL, PHILLIP M. ORDWAY, JACK E. PENDELTON, CHARLES RICE, WILLIAM S. AGEE, D. L. BAKER, JAMES D. BATEMAN, H. M. BAUER, ROBERT F. BEAGLE, JAMES H. BEERER, MICHAEL J. BERNARDO, DAVID L. BIGELOW, DONALD G. BJORKLUND, WALTER E. BLORE

versus

AIRLINE PILOTS ASSOCIATION INTERNATIONAL, CONTINENTAL AIRLINES MASTER EXECUTIVE COUNSEL, HENRY A. DUFFY, D. KIRBY SCHNELL, R. PETER LAPPIN, DONALD A. HENDERSON

Houston, Texas
November 30th, 1987 2:30 P.M.

COURT'S RULING

BEFORE THE HONORABLE LYNN N. HUGHES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Defendants:

Mudge, Rose, Guthrie, Alexander & Ferdon

By: Mr. Harold G. Levison
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180 Maiden Lane
New York, New York 10038

Boyar, Norton, & Blair

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Stubbman, McRae, Sealy & Browder, Inc.

By: Mr. Reginald H. Wood
2400 Republicbank Center
Houston, Texas 77002

THE COURT: Thank you. Be seated.

Even though the hour is late, I am going to give a general outline of my judgment in this case and produce a written document. The written document may vary a little because I may omit things or modify it, but I think the parties, for their own purposes, need to know the general nature of the resolution as soon as possible.

I am going to grant the Defendant's Motion For Summary Judgment.

I think the order signed by Judge Roberts is inescapably an order. Under the circumstances of the existing bankruptcy law since there was little that Continental could do without the approval of the Court, the approval of the Court in this instance, however minor, the Court's contribution to the terms of the resolution, the Court's participation was essential.

Now, that's a fairly narrow holding and I am not saying all agreed orders are not contracts and similar things, but under the circumstances of this case, beyond that, in the alternative, I am not going to rule under Count 1 on

the nature of the resulting relationship between Continental and a retired pilot because the retirement questions are subjudice elsewhere.

So assuming that the October 31 transaction were merely an agreement, the Court finds that the Union did not breach its duty of fair representation.

There is nothing to indicate that the Union made any choices among the Union members or the strikers who were not Union members other than on the best deal that the Union thought it could construct; that the deal is somewhat less than not particularly satisfactory is not relevant to the issue of fair representation.

In Count 2, the equality within the craft under the cases apparently precludes that claim.

As I've indicated before, that in no way means that either Congress or the Court intended to cleanse or approve of failing to do something that they should do to everyone.

That may save it from that statutory violation, but that's not an endorsement of practice.

The variation on the theme in Count 3 under the various sections of the statutes has the same result and that is that the activities of the Union may be characterized as sloppy, ineffectual, short-sighted or some other value judgment result, but that is not the same as to say it is a violation of a statutory duty to any particular pilot or group of pilots.

The Court is concerned about the August 1984 resolution being secret. It, of course, was not secret from the 9-member committee who purportedly represented the Union, but I do not think it is properly part of the policy of this operating division of ALPA.

However, that's not much comfort to the Plaintiffs because what was done through other meetings was sufficient, I think, to confer authority on the negotiating agents for the MEC, who were the general agents for the membership.

I have seen nothing in the documents that would preclude the conferring of a plenary binding general agency on some representative sent to negotiate the contract, whether it's a working agreement or a back-to-work agreement.

The Court does not then need to decide whether a working agreement is categorically different from a back-to-work agreement in this case and, therefore, not subject to the strictures of Section 17 Policy Manual.

It seems to the Court that the circumstances, it would make a back-to-work agreement susceptible to short, dead lines, crises of operation, crises of administration and other limitations in the orderly process of the Union would also frequently be true of the ordinary working agreement negotiations.

The failure of the Union to follow a number of the procedural steps, while bad practice and undesirable policies, does not amount in this case as a matter of law to a breach of fiduciary duty.

Since the agreement that was achieved looks atrocious in retrospect, but it is not a breach of fiduciary duty badly to settle the strike and I suspect if all the parties had it all to do all over again, most of them would have adopted different tactics throughout the entire labor problems with Continental.

The loss to the Plaintiffs, while not technically money or property under the cases, are rights of considerable economic importance.

Count 4 which I earlier characterized as a common law breach of fiduciary duty falls for essentially the same underlying, undisputed fact reasons that the statutory claims under Count 3 fall and that is that none of the statutes nor common law entitle the pilots to a risk-free choice in their decisions in dealing with what was indisputably a hostile intransigent employer.

It is only natural and human for the pilots to feel displeased with the Union. That does not amount to a

breach of the Union's fiduciary duty to this group or its individual components.

I don't think that the behavior of the Union has been shown to have any segment of proclivity to it except in the pilots' view that they ultimately end up cooperating with Continental Airlines.

From that fact alone and from the fact that they used every tactic available to them to insure that their resolution of the dispute would not be upset cannot be translated into personal animosity or illegal motives against these pilots.

Although I don't think the Court needs to reach it, the Court is somewhat troubled by the argument that ratification was not necessary because it wasn't a labor agreement because we didn't cover everybody and couldn't cover everybody because we weren't the bargaining agent any more.

That seems to me to be fairly circular and to say it was all right to violate your agency with these pilots because to attempt to represent them completely would have required that you violate the Railway Labor Act and to put it ahead of their policies doesn't seem substantial.

I don't understand the labor law to have precluded the Union from having discussed the future of non-Union strikers or other conditions and terms of Continental's employment practices that might affect people other than their direct membership.

If I am wrong about that, you can supply me a case; but so far I have not understood anything in these statutes to have precluded the Union from structuring a larger settlement than its membership alone, and I'm obviously not deciding whether or not ALPA was the designated bargaining representative for Continental at this time. That's covered by the other case, too, I believe.

All right. That may not be as lucid as it ought to be, but I'm either sorry or grateful that I do not spend as

much time in labor law as you gentlemen do. I am sorry you counsel do, but I will try to write it down so it will make sense and you can file your Motion For Reconsideration.

Anything further this afternoon?

MR. LEVISON: No, Your Honor.

MR. HARPER: Thank you, Your Honor.

THE COURT: Thank you, counsel.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 88-2848

JOSEPH E. O'NEILL, *et al.*,
Plaintiffs-Appellants,

v.

AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL, *et al.*,
Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas

Oct. 31, 1989

Marty Harper, Allen R. Clarke, Lewis & Roca, Phoenix, Ariz., William E. Schweinle, Jr., Reginald H. Wood, Stubberman, McRae, Sealy, Laughlin & Browder, Houston, Tex., for plaintiffs-appellants.

Harold G. Levison, Mudge, Rose, Guthrie, Alexander & Ferdon, New York City, John A. Irvine, Thelen, Marrin, Johnson & Bridges, Houston, Tex., for defendants-appellees.

Before POLITZ, DAVIS and DUHE, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Joseph O'Neill, et al., (the O'Neill Group or the pilots) appeal from the district court's grant of summary judgment dismissing their action against the Air Line Pilots Association (ALPA). We vacate the district court's dismissal of the pilots' unfair representation claim, and remand the case to the district court for further proceedings on this count. We affirm the district court's dismissal of the pilots' claim for relief under section 101 (a) (1) of the Labor-Management Reporting and Disclosure Act (LMRDA).

I.

This dispute arises out of the settlement of a two-year strike by ALPA against Continental Air Lines (CAL). The O'Neill Group were ALPA members employed as pilots by CAL, and participated in the strike against the airline.

ALPA has been the authorized and exclusive bargaining representative for the airline pilots employed by Continental Air Lines and its corporate predecessors since the 1940s. CAL and ALPA adopted their most recent collective bargaining agreement in 1982. In 1983, CAL waged a campaign to win substantial financial concessions from its employee groups, including CAL pilots. CAL and the pilots' union ultimately failed to reach a concession agreement and in September 1983, CAL filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101, et seq. CAL then repudiated its existing collective bargaining agreements with ALPA and its other unions, and unilaterally implemented its previously requested concessions as "emergency work rules," including cuts of more than fifty percent in pilots' salaries and benefits.

In October 1983, ALPA, initiated a lawful pilot strike in response to CAL's rejection of its labor contract, and filed suit under the Railway Labor Act, 45 U.S.C. § 151, et seq. (RLA), to enforce the collective bargaining provisions. The strike lasted for more than two years, during

which time CAL continued to operate by employing cross-overs and hiring large numbers of permanent replacement pilots. The number of working pilots grew; by August 1985, working pilots at CAL exceeded the number of strikers 1,600 to 1,000.

In June 1984, after extended litigation, the bankruptcy court approved CAL's rejection of the ALPA-CAL collective bargaining agreement, and ordered ALPA and CAL to engage in collective bargaining over the formation of a new labor contract. CAL and ALPA met on and off until late August 1985, when CAL notified ALPA that it was withdrawing recognition of ALPA as the authorized collective bargaining representative of the CAL pilots. ALPA filed suit in the Southern District of Texas in September 1985, challenging CAL's unilateral withdrawal of recognition and its refusal to engage in further negotiations.

As part of its continuing process of filling pilot vacancies, on September 9, 1985, CAL posted "Supplementary-Base Vacancy Bid 1985-5." CAL historically provided for future pilot training and staffing needs through its "System Bid" process. Under CAL's System Bid procedure, any pilot interested in a posted vacancy could submit a bid specifying the pilot's preferred positions based on status (*i.e.*, Captain, First Officer, Second Officer), base (city), and equipment type. Once pilots submitted their bids to CAL, vacant positions were allocated solely according to seniority, determined by the date a pilot first flew for Continental. Promotions to vacancies on new or different equipment from which a pilot had been trained required additional training of pilots before the vacancies were actually filled. CAL's bids were posted well in advance of these vacancies in order to schedule this training while maintaining current service. The 85-5 bid announced vacancies to be filled in 1986 for 441 future Captain and First Officer positions and an undetermined number of Second Officer vacancies. All

participating pilots were requested to submit their bids by September 18, 1985.

Apparently concerned by the number of future vacancies to be awarded under the 85-5 bid, ALPA's Master Executive Council for the CAL pilots (CAL MEC or the MEC),¹ authorized striking pilots to submit bids while also continuing the strike effort. Confusion over the bids tendered by several hundred strikers and questions concerning the legitimacy of their offers to return to work led CAL to challenge the strikers' bids. In late September 1985, the CAL MEC voted to continue the strike.

During October 1985, CAL and a pilots' committee, drawn from ALPA leadership and the CAL MEC, conducted negotiations under the supervision of the bankruptcy court that resulted in an October 31, 1985 consent agreement termed the "Order and Award." This order and award entered by the bankruptcy court established terms for settling both the ALPA strike and the outstanding litigation between the parties. ALPA consented to entry of the order and award without notice to or ratification by the CAL pilots or the CAL MEC.

The October 31, 1985 order and award altered CAL's standard bidding system for the 85-5 bid and the recall of striking pilots. The agreement established three options for strikers. Striking pilots who wished to return to work were required to choose either option 1 or option 3. Option 1 required strikers to waive all claims against CAL (including claims in bankruptcy for unpaid wages, and damages against CAL for abrogation of the collective bargaining agreement). In return CAL agreed to call them back to work according to "modified" seniority provisions. The relevant "transitional" modifications to seniority order and bid procedures included: (1)

¹ The CAL MEC is a committee made up of pilot representatives elected by ALPA rank-and-file. The CAL MEC serves as the ALPA coordinating council for CAL pilots, although its authority is subject to the decisions of the ALPA executive board and board of directors.

current working pilots (nonstrikers) were awarded the first 100 Captain positions in the 85-5 bid. These working pilots were generally ineligible for these positions under an integrated seniority list that included strikers and nonstrikers and standard bidding procedures; (2) the next seventy Captain position were to be awarded to the seventy most senior returning strikers who waived their claims against CAL, all of whom had been Captains before the strike. In filling these seventy vacancies, CAL had the right to assign these returning strikers to the base and equipment of CAL's choice. Additionally, these returning strikers were required to fly as First Officers for four months before assuming the Captain vacancies; (3) thereafter returning strikers would assume Captain positions on a 1:1 ratio with working pilots, essentially "dovetailing" a striker seniority list with a seniority list for replacement pilots.

The working pilots, following usual bid procedures, were awarded particular vacancies under the 85-5 bid on seniority according to their registered preferences for rank, base and equipment; although CAL recalled former strikers by seniority among strikers, CAL assigned each returning striker to CAL's choice of rank, base or equipment regardless of the pilots' preferences. These provisions had the effect of advancing many nonstriking pilots over more senior striking pilots, and awarding to nonstrikers the majority of the 85-5 Captain vacancies, the most desirable positions. Returning strikers, although recalled in seniority order, were required to accept the position offered by CAL, which could be a rank well below what the pilot was entitled to under seniority bidding procedures. Where a former striker upon recall was assigned initially to a First or Second Officer position, CAL had the right to assign the pilot to the base and equipment of his first Captain position as well.²

²To illustrate the effect of these transitional provisions, the O'Neill Group estimated in December 1987 that the most senior

The Agreement provided for filling Captain vacancies on a 1:1 ratio between striker and nonstrikers until at least October 1, 1988. The practical effect of these "transitional" provisions was foreseeably much longer. For example, equipment freezes restricted the ability of pilots to change types of aircraft for varying periods of time after being trained on them (typically two years).

Option 3 permitted pilots to keep their claims against CAL, but provided that they could not return to work nor become Captains until after the Option 1 pilots. Option 3 pilots were to be recalled in the order in which they tendered their unconditional offers to return to work rather than in seniority order. CAL retained the same right to assign the Option 3 pilots to vacancies as described above for Option 1 pilots.

Option 2 covered strikers who elected not to return to work for CAL. CAL agreed to pay these pilots severance pay of \$4,000 for each year of service, up to a total dollar amount of \$2.6 million. In return, the strikers relinquished their right to recall, and released all other claims against CAL.

II.

The O'Neill Group is a certified class comprised of approximately 1,400 past and present CAL pilots who went on strike on October 1, 1983 and remained on strike through October 31, 1985, the date the strike ended. The O'Neill Group brought suit against ALPA, the CAL MEC, and certain individual negotiators in April 1986

returning striker not yet flying as Captain had 23 years of seniority, held seniority number 65 on the integrated seniority list and flew as a Captain before the strike. The most senior working pilot not yet flying as a Captain had four years of seniority at CAL and held seniority number 1442. In addition, the nonstriker bid for his Captain vacancy, whereas the former striker could be assigned his base and equipment by CAL. (Instr. 163, att. 13). Under the 1:1 ratio prescribed by the Order and Award, these were the next two pilots to be promoted to Captain.

for their roles in the strike settlement. In its complaint as amended, the O'Neill Group sought recovery on four counts. Count 1 alleged a breach of the duty of fair representation which ALPA and various ALPA officers owed plaintiffs under the RLA. Count 2 alleged a violation of the voting rights of the plaintiffs, guaranteed under section 101(a)(1) of the LMRDA, 29 U.S.C. § 411. The O'Neill Group also asserted two additional claims not relevant to this appeal.

In August 1987, ALPA moved for judgment on the pleadings and for summary judgment on all counts. The O'Neill Group's response to ALPA's motion for summary judgment was a 150-page memorandum of law and five volumes of affidavits and other exhibits. The O'Neill Group asserted that the duty of fair representation had been breached by ALPA and various ALPA officers because (1) ALPA failed to allow ratification of the agreement and misrepresented the facts surrounding the negotiations to avoid a ratification vote; (2) ALPA negotiated an agreement that arbitrarily discriminated against striking pilots, including the O'Neill Group; (3) ALPA and various ALPA officers misrepresented to retired and resigned pilots that they would be included in any settlement; and (4) defendants were compelled by motives of personal gain, namely self-interest and political motivations. Concerning the LMRDA section 101 claim, the pilots asserted that they were entitled to vote on ratification of the agreement and order, and that liability under LMRDA is assessed against a union that violates the voting rights of all of its members as a matter of law.

Following oral argument in November 1987, the trial court ruled from the bench, granting ALPA's summary judgment motion and dismissing the pilots' suit. The transcript of the court's general bench remarks following argument provides the only explanation for its ruling.

Rather than finding the settlement "beneficial" as ALPA claimed, the trial court remarked: "that the deal is somewhat less than not particularly satisfactory is not relevant to the issue of fair representation," adding that "the agreement that was achieved looks atrocious in retrospect, but it is not a breach of fiduciary duty badly to settle the strike." The court apparently concluded that the pilots had no legal rights against ALPA because the settlement was issued as a court order, and alternatively because the agreement did not single out particular members for discriminatory treatment. "There is nothing to indicate that the union made any choices among the union members or the strikers who were not union members other than on the best deal the union thought it could construct." With respect to the pilots' claim that ALPA denied their voting rights, the district court concluded that: "in Count 2, the equality within the craft under the cases apparently precludes that claim."

The O'Neill Group appeals the dismissal of Count 1 (duty of fair representation) and Count 2 (LMRDA section 101 ratification rights) of their complaint.

III.

Our task in this case is to review the district court's determinations that no genuine issue of material fact is presented and summary judgment is proper as a matter of law. This undertaking in a complex case with a summary judgment record in excess of 6,000 pages is particularly difficult because the district court's cursory bench remarks provide little help to us in analyzing the issues. As this court reiterated recently, "Although nothing in Fed.R.Civ.P. 56, governing summary judgment, technically requires a statement of reasons by a trial judge for granting a motion for summary judgment, we have many times emphasized the importance of a detailed discussion by the trial judge." *McIncrow v. Harris County*, 878 F.2d 835, 835 (5th Cir. 1989), quoting, *Heller v. Namer*, 666 F.2d 905, 911 (5th Cir. 1982)

(footnote omitted). "In all but the simplest case, such a statement usually proves not only helpful, but essential." *Jot-Em-Down Store (JEDS) Inc. v. Cotter & Co.*, 651 F.2d 245, 247 (5th Cir. 1981). "When given such aid, counsel know what issues must be met and the appellate court need not scour the entire record while it ponders the possible explanations." *Id.*

To survive summary judgment, the O'Neill pilots are required to present summary judgment evidence tending to show a genuine issue of material fact. In several recent decisions, the Supreme Court has clarified what is required of the plaintiffs by this standard. "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). "Rule 56(e) therefore requires the non-moving party to go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' to designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324, 106 S.Ct. at 2553. Plaintiffs' evidence is to be believed, however, and all justifiable inferences are to be drawn in their favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986). In reviewing the district court's ruling on a motion for summary judgment, we apply the same standard that governs the district court. *Bache v. American Tel. & Tel.*, 840 F.2d 283 (5th Cir.), cert. denied, — U.S. —, 109 S.Ct. 219, 102 L.Ed.2d 210 (1988).

A. Fair Representation Claims

The duty of fair representation owed by a union to its members has been implied by the courts from national

labor statutes. The Supreme Court has stated that the duty of fair representation imposes on the exclusive bargaining representative "a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 910, 17 L.Ed.2d 842 (1967). More succinctly, "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190, 87 S.Ct. at 916.

ALPA would have us adopt a standard which requires intentional or deliberate misconduct by the union in order to find a breach of the duty of fair representation. We consistently have held, however, that the Supreme Court's definition of the duty of fair representation enunciated in *Vaca v. Sipes* "recognizes three distinct standards of conduct." *Tedford v. Peabody Coal Co.*, 533 F.2d 952, 957 n. 6 (5th Cir.1976). See *Hammons v. Adams*, 783 F.2d 597, 601 (5th Cir.1986) ("[The union's] conduct, however, must not be 'arbitrary, discriminatory, or in bad faith;' a standard that has since been repeated by the Court with only minor rephrasing.") (citations omitted); *Christopher v. Safeway Stores, Inc.*, 644 F.2d 467 (5th Cir.1981); *Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332 (5th Cir.1980); *Sanderson v. Ford Motor Co.*, 483 F.2d 102, 110 (5th Cir.1973). See also *Griffin v. Int'l Union, United Automobile A & AIW*, 469 F.2d 181, 183 (4th Cir.1972) ("A union must conform its behavior to each of these three separate standards. . . . Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.").

A breach of the duty of fair representation does not require that a union's conduct be taken in bad faith or with hostile discrimination, but may rest upon the arbi-

trariness or irrationality of the union's acts. See *Bache v. AT & T*, 840 F.2d at 291. Addressing "the arbitrariness standard" this circuit has stated in *Tedford*:

We think a decision to be non-arbitrary must be (1) based upon relevant, permissible union factors which excludes the possibility of it being based upon motivations such as personal animosity or political favoritism; (2) a rational result of the consideration of these factors; and (3) inclusive of a fair and impartial consideration of the interests of all employees.

Tedford, 533 F.2d at 957 (footnotes omitted) (emphasis added).

A breach of the duty of fair representation requires more than a showing of negligence or "honest, mistaken conduct." *Amalgamated Ass'n of Street, etc. v. Lockridge*, 403 U.S. 274, 301, 91 S.Ct. 1909, 1925, 29 L.Ed.2d 473 (1971). *Accord Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71, 96 S.Ct. 1048, 1059-60, 47 L.Ed.2d 231 (1976); *Coe v. United Rubber Workers*, 571 F.2d 1349, 1350 (5th Cir.1978) (per curiam) ("carelessness or inadvertence neither constitutes nor is evidence of" a breach of fair representation duty). Particularly in the bargaining context, a union's responsibilities permit the exercise of judgment within a wide range of reasonableness, "subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Hammons v. Adams*, 783 F.2d at 601, quoting, *Hines* 424 U.S. at 564, 96 S.Ct. at 1056. In order to prove a breach of the union's duty to the membership, it is insufficient to show merely "that the union improperly balanced the rights and obligations of the various groups it represents." *Freeman v. Grand Int'l Bro. of Locomotive Engineers*, 375 F.Supp. 81, 93 (S. D. Ga.), *aff'd*, 493 F.2d 628 (5th Cir.1974).

ALPA argues that the bankruptcy court's approval of the order and award gives rise to a presumption that the

settlement is fair, adequate and reasonable. We disagree; all the terms of the settlement the pilots complain of in this litigation had been resolved by ALPA and CAL before the proposed order was submitted to the bankruptcy court. The order and award therefore constituted in essence a consent decree, embodying "primarily the results of negotiation rather than adjudication." *United States v. City of Miami*, 664 F.2d 435, 440 (5th Cir. 1981). We agree with the pilots that the bankruptcy court's approval of the settlement does not insulate ALPA's conduct from scrutiny, nor bar the pilots' claims. See *Ibarra v. Texas Employment Com'n.*, 823 F.2d 873 (5th Cir.1987).

We now turn to the pilots' specific arguments of how ALPA breached the duty of fair representation. The pilots' most fundamental complaint is that ALPA's strike settlement was irrational and arbitrary because of the gross disadvantages the pilots suffered under the settlement that they would not have suffered if they had simply surrendered to CAL's demands and returned to work. We are persuaded that a jury would be entitled to infer that ALPA was arbitrary in accepting the strike settlement if it finds that the union should have expected much more favorable treatment for the pilots had the pilots simply given up the strike effort and offered to return to work. In other words, a jury might reasonably find the union's conduct irrational or arbitrary if the union inexplicably agreed to a settlement that left its members in a substantially worse position than if no settlement had been made. We conclude that a jury could find that the order and award left the striking pilots worse off in a number of respects than complete surrender to CAL.

ALPA contends that the strike settlement provided for CAL to reemploy strikers who would not have otherwise been entitled to return to work at CAL. We disagree. The striking CAL pilots who had not obtained substantially similar jobs (as pilots) continued to be employees

of CAL. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378, 88 S.Ct. 543, 545, 19 L.Ed.2d 614 (1967). Because this strike was an economic one, CAL was entitled to hire permanent replacement workers to continue business operations. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46, 58 S.Ct. 904, 910-11, 82 L.Ed.2d 1381 (1938). Had the strike terminated without the settlement, CAL was not required to discharge these replacement workers in order to rehire the former strikers. But absent exceptional circumstances discussed below, the returning strikers, as CAL employees, were entitled to reinstatement as vacancies occurred. *Id.*

ALPA asserts several possible justifications which CAL potentially could have offered to avoid rehiring the returning strikers. These justifications include "legitimate and substantial business reasons," and striker "misconduct." See *OCAW v. American Petrofina Co.*, 820 F.2d 747, 750 (5th Cir.1987). But the summary judgment evidence provides no clear basis for this concern. Furthermore ALPA's outside legal counsel advised the ALPA leadership in September 1985 that CAL had not practiced dilatory tactics in reinstating individual strikers who offered to return to work, and consequently he felt such tactics were unlikely should ALPA submit an offer to return on behalf of all strikers. Thus a factfinder could infer that ALPA knew that CAL would not have refused to rehire strikers if ALPA had tendered an unconditional offer for the pilots to return to work.

The most fundamental rights the strikers lost in the order and award were their rights that flowed from seniority. ALPA argues that the pilots had absolutely no assurance that CAL would have recognized any of their seniority rights if they had unconditionally offered to return to work. Thus, ALPA contends that the limited seniority secured by the settlement was beneficial to the pilots. The pilots submitted strong summary judgment evidence however that CAL intended to reinstate strikers with ordinary seniority rights and privileges after the

strike ended.³ ALPA was advised by its legal counsel in September 1985 that CAL would be obligated to recall strikers in seniority order if they were still employees of the company. Accepting the pilots' evidence as true as we are required to do, a jury could reasonably conclude that if ALPA had unconditionally offered to return the pilots to duty, CAL likely would have returned striking pilots to work according to seniority, and would have permitted strikers to bid for vacancies according to CAL's seniority-based assignment procedures.

Furthermore, if the pilots had unconditionally agreed to return to work, CAL could not have changed its policy of assigning work by seniority, thereby adversely affecting returning strikers, unless it had a legitimate and substantial business justification for doing so. See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34, 87 S.Ct. 1792, 1798, 18 L.Ed.2d 1027 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 231, 83 S.Ct. 1139, 1147, 10 L.Ed.2d 308 (1963); *George Banta Co. v. NLRB*, 686 F.2d 10, 19 (D.C.Cir.1982); *Lone Star Industries, Inc.*, 279 N.L.R.B. 550, 122 L.R.R.M. 1162 (1986). Yet the

³ For example, CAL's standard bidding procedures, awarding vacancies to the bidders with highest seniority, were in effect before and during the strike, and were not altered for replacement pilots or for individual strikers who had chosen to return to work. (Instr. 163, atts. 8,9; Instr. 149, exh. 101). CAL stated in a claim filed September 25, 1985 in the Southern District of Texas (hoping to void all 85-5 bids from strikers) that it honored pre-strike seniority of all pilots returning from the strike; that all striking pilots continued to accrue seniority during the strike; and that many strikers were eligible to win their bids for Captain positions under the 85-5 bid because of their seniority levels (Instr. 163, att. 9, ¶¶ 10, 32). The record further includes evidence that ALPA discussed the subject with CAL during the September 1985 MEC meetings, and CAL indicated that it would honor an unconditional return and recall strikers in seniority order according to their bids. (Instr. 163, att. 5.5 at 166-69). CAL had returned striking flight attendants and machinists to work in seniority order, with all the benefits and privileges of seniority, after both unions tendered unconditional offers to return to work in April 1985. (Instr. 163 att. 6).

order and award allowed CAL to disregard the seniority of returning strikers in awarding jobs and to assign less senior nonstriking pilots to vacant positions. If a jury accepts the pilots' evidence that CAL likely would have recognized the returning strikers' seniority rights and privileges if they had unconditionally agreed to return to work it could further infer that ALPA was arbitrary in accepting the unfavorable settlement.

We reject ALPA's argument that the 85-5 bid positions were not vacancies at the time the order and award issued because they had been assigned to working pilots by that date. In August 1985, ALPA prevailed on this issue in another suit: a federal district court held that bid positions were not filled until pilots were trained and serving in these positions. *ALPA v. United Air Lines, Inc.*, 614 F. Supp. 1020 (N.D.Ill. 1985), *aff'd in relevant part*, 802 F.2d 886 (7th Cir.1986), *cert. denied*, 480 U.S. 946, 107 S.Ct. 1605, 94 L.Ed.2d 791 (1987). *See also Indep. Federation of Flight Attendants v. Trans World Airlines, Inc.*, 819 F.2d 839 (8th Cir.1987). ALPA, in the face of this favorable ruling in an analogous case involving striking United Airlines pilots, approved the terms of the order and award, generally permitting replacement pilots to keep the 85-5 bid vacancies awarded them, except in isolated instances where the transition provisions of the settlement otherwise provided.

In sum, the returning strikers were generally senior to the working pilots and under ordinary seniority rules entitled to fill the vacancies announced in the 85-5 bid. Yet the terms of the order and award gave the nonstriking, working pilots most of these positions. Also returning strikers who wanted to return to work were required to waive any claims for damages they had against CAL. A factfinder could infer that had ALPA unconditionally offered to return the pilots to work, the strikers would have been recalled in seniority order, and would have been able to successfully bid for these vacancies and also preserve their litigation rights against CAL.

The pilots also contend that ALPA breached its duty of fair representation by negotiating a settlement which impermissibly discriminated against strikers. The pilots argue that the order and award impermissibly preserved strikers and nonstrikers as two distinct groups after recall so CAL could reward the nonstrikers and punish the strikers. ALPA argues it must be given broad negotiating discretion and that agreeing to an arrangement which divides CAL pilots into strikers and nonstrikers for a transitional period is not per se illegal or a breach of its duty to the pilots. The Supreme Court has stated that a wide range of reasonableness must be allowed a bargaining representative in serving the unit it represents, but a union's broad authority in negotiating and administering effective agreements is not without limits. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554.

The Supreme Court has expressed special concern for post-strike working conditions which "create[] a cleavage . . . continuing long after the strike is ended. Employees are henceforth divided into two camps: those who stayed with the union and those who returned before the end of the strike and thereby gained extra seniority. This breach . . . stands as an ever present reminder of the dangers connected with striking and with union activities in general." *NLRB v. Erie Resistor Corp.*, 373 U.S. at 230. "These are the types of employer action that have been held inherently destructive of employee rights." *NLRB v. American Olean Tile, Co.*, 826 F.2d 1496, 1500 (6th Cir.1987). The pilots have raised a genuine issue of material fact as to whether the adverse, discriminatory post-strike treatment of strikers under the strike settlement can be justified. Depending upon the explanation offered by ALPA, a factfinder might infer that the negotiated division of pilots into strikers and nonstrikers and the subsequent unfavorable discriminatory treatment of returning strikers constituted a breach of the union's duty of fair representation.

B. Ratification Rights.

The O'Neill Group asserts in its second count that the union violated section 101(a)(1) of LMRDA by denying the right of rank-and-file members to ratify the settlement agreement.

Section 101(a)(1) of LMRDA states:

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

29 U.S.C. § 411(a)(1). Section 101(a)(1) does not grant voting rights where none are conferred by a union's constitution or bylaws; rather it serves to protect the fair exercise of any rights that are provided by the union's constitution and bylaws.

The law does not require that a collective bargaining agreement be submitted to a local union or the union membership for authorization, negotiation or ratification, in the absence of an express requirement in the agreement, or in the constitution, by-laws or rules and regulations of the union. The statute [LMRDA § 101(a)(1)] does not require submission of proposed agreements or any segments thereof to the membership; nor grant members of the right to vote on negotiating, executing and approving contracts.

Confederated Independent Unions v. Rockwell-Standard Co., 465 F.2d 1137, 1140 (3d Cir.1972) (citations omitted). Thus, our first inquiry is to examine whether voting rights were conferred upon the rank-and-file by the ALPA constitution or bylaws.

The ALPA constitution as amended in 1982 provided in relevant part:

Sec. 2. The conclusion of an agreement shall, at the direction of the individual Master Executive Council, be subject to ratification.

Both parties agree that the above constitutional provision required ratification by the membership if, but only if, the MEC subjected an agreement to ratification. Thus we must decide whether the CAL MEC had determined that the proposed settlement of the CAL pilots strike required ratification before the order and award was submitted to the bankruptcy court.

The pilots contend that CAL MEC passed a resolution in September 1983 requiring pilot ratification of any agreement giving concessions to CAL. They rely upon this resolution for the right of the membership to ratify the strike settlement of October 31, 1985. The relevant portion of this states: "BE IT FURTHER RESOLVED that the final pilot cost reduction plan will be subject to membership ratification prior to final approval and implementation."

This resolution was passed by the CAL MEC during a meeting in which the MEC was debating whether to participate in a \$150 million cost reduction plan for all CAL employees. CAL had been in financial trouble for some time, and in September 1983 had submitted specific cost reduction proposals to its employee groups. A \$60 million package of pay, benefits and productivity concessions was submitted to the CAL pilots, embodied in a document known as the "New Continental Pilot Employment Policy." In its September 19 resolution, the CAL MEC agreed in principle to participate in the \$60 million cost reduction plan, but sought to negotiate over its specific terms. The MEC further resolved that the final cost reduction plan would be subject to membership ratification. CAL and ALPA did not agree on a final plan,

and on September 24, 1983, CAL filed a bankruptcy petition.

The language of this resolution is unambiguous. It does not grant a blanket right to the membership to ratify all future strike settlements; it plainly accords to the membership the right to ratify the "final cost reduction plan" under discussion at that time. This resolution by its plain language does not support the pilots' asserted right to ratify the strike settlement agreement reached more than two years later.

The pilots further contend that MEC officials orally assured the pilots throughout the strike that the rank-and-file would be able to vote on any strike settlement.⁴ A factfinder might infer a breach of ALPA's duty of fair representation if it finds the union misrepresented the right of the membership to ratify any settlement agreement. *Cf. Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1397 (9th Cir.), cert. denied, 479 U.S. 816, 107 S.Ct. 73, 93 L.Ed.2d 29 (1986) ("a duty of fair representation cause of action can be maintained when union representatives make misrepresentations to the union membership during the ratification process"); *Christopher v. Safeway Stores, Inc.*, 644 F.2d 467, 472 (5th Cir.1981). But misrepresentations by individual MEC members or union officials to pilots do not provide the necessary express grant of a ratifica-

⁴ The pilots also argue that section 101 was violated because the union failed to obtain MEC approval for the settlement as required in the MEC policy manual. But section 101 only secures certain rights of the rank-and-file members to vote and to participate in their union affairs. Thus, accepting for these purposes the pilots' interpretation of the union policy, the union's violation of the policy by refusing to allow MEC to approve the settlement is not actionable under section 101 because it is not a right granted to the rank-and-file membership. The pilots have the opportunity on remand to persuade the district court that if the policy requiring MEC approval was violated, this is a predicate for recovery on their unfair representation claim.

tion right to the rank-and-file members that is required to support an action under section 101(a)(1).

Ordinarily a ratification right accorded a union's membership is contained in the union's constitution or bylaws. Here the constitution delegated authority to the MEC to decide which agreements the members were entitled to ratify. According to the CAL MEC's policy manual, MEC policy is to be established, amended or rescinded by a majority vote of the MEC. Certainly assurances by individual MEC members to rank-and-file members of a ratification right are not decisions of the MEC body. Where the voting right is not contained in the constitution and bylaws any provision for membership ratification must be clear and unambiguous; to trigger section 101 protection the voting right must be expressly granted according to established policymaking procedures. To imply a voting right where none is clearly provided would impermissibly interfere with the union's organizational structure. *See Calhoon v. Harvey*, 379 U.S. 134, 140, 85 S.Ct.292, 296 13 L.Ed.2d 190 (1964). In sum, we agree with the district court that the union members had no right to approve the settlement embodied in the order and award. Summary judgment was proper as to this claim.

C. Conclusion

Based on our review of the summary judgment record, we find at least two critical issues of material fact that preclude summary judgment on the union's duty of fair representation claim. First, a factfinder may infer that the settlement agreement negotiated by ALPA was so less favorable to the striking pilots than the likely consequences of a total surrender of the strike effort as to be arbitrary and a breach of the union's duty to fairly represent its members. A jury would also be entitled to find that the agreed-to settlement provisions breached the union's duty of fair representation because it impermis-

sibly and unjustifiably divided the CAL pilots after recall into two camps of former strikers and nonstrikers and permitted CAL to discriminate against strikers. It is unnecessary for us to decide whether additional issues of fact are presented on this claim. We agree with the district court's dismissal of the pilots' section 101 voting rights claim.

The judgment of the district court is therefore VACATED and the case REMANDED for further proceedings consistent with this opinion.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2848

JOSEPH E. O'NEILL, *et al.*,
Plaintiffs-Appellants,

versus

AIRLINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,
Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas

**ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING *EN BANC***

(Opinion October 31, 5 Cir., 1989, — F.2d —)

(December 27, 1989)

Before POLITZ, DAVIS and DUHE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

() The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the

members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

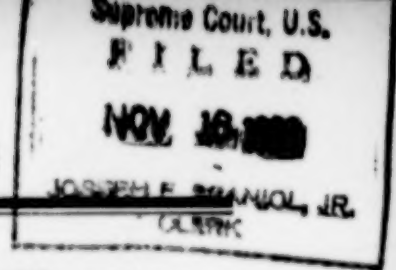
() A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

(5)

No. 89-1493



IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
Petitioner,

v.

JOSEPH E. O'NEILL, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether petitioner breached its duty of fair representation by negotiating a back-to-work agreement that ended a strike by pilots against Continental Air Lines and allocated positions between returning strikers and pilots who worked during the strike?*

* At the *certiorari* petition stage, our Petition at p. i, the respondents' Brief in Opposition at p. 1, and the Brief for the United States as *Amicus Curiae* at p. ii phrased the basic legal issue presented here in three different ways. At this juncture, and in the interest of focusing the discussion on the ultimate merits issue, we accept—and adopt as our own—the Solicitor General's formulation of the Question Presented.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 886 F.2d 1438 (5th Cir. 1989). The court of appeals also issued an unreported order upon petitions for rehearing and rehearing *en banc*. The District Court opinion was issued from the bench.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1989. Timely petitions for rehearing and rehearing *en banc* were denied on December 27, 1989. This Court has jurisdiction to review the judgment of the court of appeals by writ of *certiorari* pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Respondents' complaint alleges a breach of petitioner's duty of fair representation which has been implied from the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA").

STATEMENT OF THE CASE

This case arises out of one of the most bitter union-management disputes of recent times: the pitched labor battle between Continental Air Lines, Inc. ("Continental") and petitioner Air Line Pilots Association, International ("ALPA"). For over two years ALPA and Continental waged economic warfare and when the smoke cleared, ALPA had to sue for peace. In this lawsuit, ALPA now stands accused of having failed to do enough to protect the striking Continental pilots in working out those peace terms. The background facts are as follows:

In 1983, ALPA was a party to a collective bargaining agreement with Continental. On September 24, 1983, Continental filed for Chapter 11 reorganization in the Bankruptcy Court of the Southern District of Texas. Immediately thereafter, Continental unilaterally abro-

gated the Continental-ALPA collective bargaining agreement, secured bankruptcy court approval for the abrogation, and cut in half the pilots' contractual salaries and benefits. Continental's preemptive actions triggered a strike by the pilots and the beginning of an all-out labor confrontation. Joint Appendix ("J.A.") 79.

In the end, ALPA proved unable to significantly affect Continental's business. The Company succeeded in finding replacement pilots who were willing to cross ALPA's picket lines to work at Continental's reduced wage and benefit level. By August, 1985, Continental had a complement of 1,600 working pilots including 1,000 pilots who had been hired as permanent replacements and 600 pilots who had not joined the strike or who had abandoned the strike and returned to work; in comparison, 1,000 pilots remained on strike at that time. J.A. 80. At that point, Continental proceeded to press home its advantage.

On August 26, 1985, Continental stated that the Company was withdrawing recognition of ALPA as the bargaining representative for its pilots, and Continental broke off negotiations with ALPA over a new collective bargaining agreement. J.A. 80.

Two weeks later, on September 9, 1985, Continental announced its intention to fill its pilot vacancies by posting the "85-5 vacancy bid" for 441 captain and first officer positions and an undetermined number of second officer positions. J.A. 80. The 85-5 bid covered nearly all of the pilot vacancies expected at Continental in the foreseeable future; indeed, the 218 vacancies posted for captain positions was the largest such posting in Continental's history.¹ District Court Docket Reference ("R.")

¹ A "vacancy bid" in the airline industry is a long term pilot training and staffing plan, which projects and fills pilot staffing needs by base (*i.e.* geographic location), equipment (*i.e.* aircraft type), and position (*i.e.* captain, first officer, second officer). The projections are based on scheduled aircraft deliveries (or sales, leases, etc.), expected retirements or attrition, and marketing plans for future flight schedules. Once a system-wide vacancy bid is announced, each Continental pilot is allowed to "bid" his or her

131, Higgins Aff. ¶ 7. Under the terms of the 85-5 bid, pilots could bid on these positions over a nine day period, and bidding closed on September 18, 1985. J.A. 80-81.

In response, after emergency internal union consultations, several hundred of the striking pilots attempted to protect their post-strike job prospects by submitting bids. J.A. 81; deposition of D. Kirby Schnell at 436, 499.² On September 25, 1985, one week after the 85-5 bid closed, Continental filed a claim in federal court against ALPA seeking to void all the 85-5 bids tendered by strikers and stating that the strikers were not entitled to any of the 85-5 bid vacancies under any circumstances. (Deposition of John J. Gallagher, Exh. 118.) After the bid closed, Continental announced that all the posted bid vacancies had been awarded to working permanent replacement pilots. (R. 131, Higgins Aff. ¶ 8.)

In late September, the Continental Master Executive Council ("MEC") (the organizational subdivision of ALPA elected to function as the governing council for ALPA members employed by Continental) held a meeting to consider Continental's actions and the proper response. The discussion centered on what the MEC considered to be the only two viable options: making an unconditional offer to return to work or pursuing a negotiated end to the strike. J.A. 81.

The MEC first rejected a motion to make an unconditional offer to return and did so largely at the urging—and with the votes—of MEC members who are named representatives of the plaintiff group. Deposition of Robert Therrien ("Therrien dep.") at 96-104. In rejecting an unconditional return, the MEC made a judgment

preference for base, equipment, and status, and the bids are awarded in seniority order. The bid award assigns each pilot to a specific base, equipment, and position. A training schedule is devised to ensure that each pilot who requires training will be trained in position on a schedule designed to avoid any shortage of qualified pilots and any disruptions to service.

² All of the depositions in the case were filed with the district court and formed part of the summary judgment record.

that, in light of Continental's handling of the posted 85-5 bid, the proper course to take in seeking to obtain access for striking pilots to the bid positions (and any other pilot positions at Continental in seniority order) was through negotiation. R. 131, Higgins Aff. ¶ 8; Therrien dep. at 102-103. The MEC then authorized the MEC officers and negotiating committee chairman to negotiate a conclusion to the strike and the terms on which the striking pilots could return to work. R. 131, Higgins Aff. ¶ 16, Exh. J; Higgins dep. at 1019-20.

Following the MEC meeting, the ALPA negotiators requested the bankruptcy court to convene an intensive round of negotiations over a back-to-work agreement; Bankruptcy Judge Roberts agreed to do so. By the end of October, 1985, ALPA and Continental had negotiated, under the bankruptcy court's auspices, significant aspects of a back-to-work agreement but had failed to reach a complete strike settlement agreement. At the parties joint request, the bankruptcy court agreed to resolve the remaining open issues, and on October 31, 1985, Judge Roberts entered an order and award of the bankruptcy court covering all aspects of the return to work of ALPA pilots. J.A. 81.

The order and award was described by the bankruptcy court as "a global [settlement which] encompasses a myriad of individual situations and circumstances." The order and award's back-to-work provisions granted pilots who agreed to waive certain individual strike litigation claims against Continental the right to choose recall and reinstatement in seniority order ("Option 1") or, if not employed by another air carrier, voluntary severance with payment of \$4,000 per year of service (\$2,000 for pilots furloughed before the strike) ("Option 2"). Pilots who chose to preserve all their litigation rights against Continental were offered recall after the Option 1 pilots had been reinstated ("Option 3"). J.A. 11, 22-23, 28.

Significantly, although Continental had already awarded all of the posted bid positions to permanent

replacements, the order and award unwound those job assignments and guaranteed that nearly half the captain positions would be granted to returning strikers in seniority order. Permanent replacements were to receive the first 100 captain positions, returning strikers the next 70 and, thereafter, returning strikers and replacement pilots were to be awarded captain vacancies on a 1:1 ratio.³ The remaining striking pilots were recalled to all available first and second officer positions and upon recall were allowed to bid in these positions purely on seniority basis. Continental also created a guaranteed schedule by which a substantial number of returning strikers would be promoted to captain or would receive captain's pay until vacancies within the schedule arose. Continental agreed too that it would accept offers to return from pilots who had already found substantially equivalent work with another employer. J.A. 11-15, 22-23, 31.

All of the foregoing provisions were subject to the continuing jurisdiction and enforcement power of the bankruptcy court to ensure that Continental would fulfill its obligations. Continental and ALPA, moreover, agreed to withdraw all its pending litigation against each other subject to the terms of the order and award.⁴ J.A. 29-30.

³ Splitting captain positions pursuant to this formula was necessary during the post-strike transition period to facilitate an orderly integration of striking pilots back into the work force. Critically, however, other than Continental's right to assign the base and equipment of a pilot's initial captain position and to require up to six months' experience as a flight officer before serving as a captain, the order and award placed no restrictions on the pilots' exercise of seniority rights once the pilot was recalled to work. Another provision of the order and award permitted Continental to assign the base and equipment of a returning striker in his/her initial post-strike position. This provision merely memorialized a right that Continental would have had even under an unconditional offer to return.

⁴ The order and award—which states that it did not "constitute express or implied recognition of ALPA by Continental"—did not

Nearly six months after entry of the order and award, a group of pilots commenced this class action on behalf of all pilots who joined the strike and were not working for Continental at the end of the strike, claiming that ALPA had breached its duty of fair representation in settling this labor dispute with Continental.

After extensive discovery, ALPA moved for summary judgment; the district court granted that motion and dismissed the complaint because the record evidence showed that the plaintiffs' claim was based on their dissatisfaction with the results their union officials obtained in good faith in the face of "what was indisputably a hostile intransigent employer." J.A. 75. That court found that there was nothing in the record to support an allegation that ALPA acted out of "personal animosity or illegal motives against these pilots." J.A. 76. Specifically, the district court found

There is nothing to indicate that the Union made any choices among the Union members or the strikers who were not Union members other than on the best deal that the Union thought it could construct; that the deal is somewhat less than not particularly satisfactory is not relevant to the issue of fair representation. J.A. 74.

On appeal, the United States Court of Appeals for the Fifth Circuit reversed. The court of appeals started from the premise that "[a] breach of the duty of fair representation does not require that a union's conduct be taken in bad faith or with hostile discrimination, but may rest upon the arbitrariness or irrationality of the union's acts," J.A. 87, and added

"We think a decision to be non-arbitrary must be (1) based upon relevant, permissible union factors which excludes the possibility of it being based upon motivations such as personal animosity or political favoritism; (2) a rational result of the consideration

enhance ALPA's position as a collective bargaining representative. J.A. 30.

of these factors; and (3) inclusive of a fair and impartial consideration of the interests of all employees." [Id. at 88, quoting *Tedford v. Peabody Coal Co.*, 533 F.2d 952, 957 n.6 (5th Cir. 1976); emphasis in original.]

And the court of appeals applied that legal standard to test the Union's judgments in settling the strike, concluding as follows:

. . . We are persuaded that a jury would be entitled to infer that ALPA was arbitrary in accepting the strike settlement if it finds that the union should have expected much more favorable treatment for the pilots had the pilots simply given up the strike effort and offered to return to work. In other words, a jury might reasonably find the union's conduct irrational or arbitrary if the union inexplicably agreed to a settlement that left its members in a substantially worse position than if no settlement had been made. We conclude that a jury could find that the order and award left the striking pilots worse off in a number of respects than complete surrender to [Continental]. [J.A. 89.]

The court of appeals also concluded that a "genuine issue of material fact" existed as to whether the strike settlement agreement was discriminatory because of the "post-strike treatment of strikers," and that a "jury would . . . be entitled to find that the agreed-to settlement provisions breached the union's duty of fair representation because it impermissibly and unjustifiably divided the [Continental] pilots after recall into two camps of former strikers and nonstrikers and permitted [Continental] to discriminate against strikers." J.A. 93.

On October 1, 1990, this Court granted ALPA's petition for a writ of *certiorari*.

SUMMARY OF ARGUMENT

The court of appeals decision in this case rests on the proposition that *Vaca v. Sipes*, 386 U.S. 171 (1967), authorizes judges—and juries—to assess the rationality of a

union decision to negotiate a settlement of a strike and of the terms of the settlement. The court of appeals both misread and misapplied *Vaca*.

The salient point of this Court's cases from *Steele v. L.&N.R. Co.*, 323 U.S. 192 (1944), to *Steelworkers v. Rawson*, — U.S. —, 58 U.S.L.W. 4556 (May 24, 1990), is that the fair representation duty is an obligation "to exercise fairly the power conferred upon [the union] in behalf of all those for whom it acts, without hostile discrimination against them." *Steele*, 323 U.S. at 203. This Court has never sanctioned review of an honest union effort, not marked by invidious discrimination, to negotiate a union-employer agreement. To the contrary, the Court has recognized that regulating the adequacy of union representation is antithetical to the federal labor laws' system of free collective bargaining.

In part I of our argument we review the Court's major fair representation decisions from *Steele* forward to demonstrate that while the phrasing of the fair representation standard is not entirely uniform, the essence of the standard was set in *Steele* and has not been expanded or contracted. As the Court said in *Breininger v. Sheet Metal Workers*, — U.S. —, 110 S. Ct. 424 (1989): "The duty of fair representation had 'judicially evolved,' *Motor Coach Employees v. Lockridge*, [*supra*, 403 U.S. at] 301, as part of federal law as an essential means of enforcing fully the important principle that 'no individual union member may suffer invidious, hostile treatment at the hands of the majority of his co-workers.' *Ibid.*" Pp. 14-25 *infra*.

We then turn to a showing that precedent aside, neither the Railway Labor Act nor the National Labor Relations Act is susceptible to being read as granting the courts the authority to regulate the caliber of honest, good faith, non-discriminatory union decision-making. Precisely because the national labor policy relies on a collective bargaining process rather than on public law for the "ordering and adjusting of competing interests," *Teamsters*

Local v. Lucas Flour Co., 369 U.S. 95, 104 (1962), that policy does *not* provide for "governmental regulation of the terms and conditions of employment." *H.K. Porter Co. v. NLRB*, *supra*, 397 U.S. at 103.

The duty of *fair* representation, as recognized in *Steele*, fits comfortably within—and, indeed, is integral to—this collective bargaining system. But any attempt by the courts to regulate the quality of union representation by reviewing the soundness of decisions made by unions in the course of dealing with employers would be contrary to the national labor policy. The necessary result would be to make the courts—rather than employers and employees—the final arbiters of the terms and conditions of employment thereby producing through the back door the very result Congress refused to legislate in the RLA and the NLRA. Indeed, any effort to judicially impose standards of minimum representation upon unions would also threaten the policies of membership control of the unions through their own internal democratic processes underlying the Labor Management Reporting and Disclosure Act. Pp. 25-36 *infra*.

We conclude part I by demonstrating that under the correct legal standard, the district court properly granted summary judgment to ALPA herein. As the court of appeals stated, plaintiffs' "most fundamental complaint" is that ALPA should have "simply given up the strike effort and offered to return to work." J.A. 89. But that complaint goes solely to the adequacy—rather than the fairness—of the representation ALPA provided. Plaintiffs here also claim that the settlement agreement "impermissibly discriminated against strikers." J.A. 93. But as *Steele* states, "[v]ariations in the terms of the contract based on differences relevant to the authorized purposes of the contract are within the scope of the bargaining representative of a craft." 323 U.S. at 203. The differentiations here could not be more "relevant" to settling this strike on terms that benefit the strikers themselves. Pp. 36-39 *infra*.

In part II of the argument we meet the court of appeals on its own ground and demonstrate that ALPA's actions in settling the strike were entirely rational.

The court of appeals proceeded from three legal premises: first, had ALPA authorized an unlimited return to work, "the returning strikers, as [Continental] employees, were entitled to reinstatement as vacancies occurred" (J.A. 90); second, the "bid positions [covered by the 85-5 bid position offer] were not filled"—and hence were deemed to be vacancies—"until pilots were trained and serving in these positions" (J.A. 92); and third, that in filling these so-called vacancies, "if the pilots had unconditionally agreed to return to work, [Continental] could not have changed its policy of assigning work by seniority . . . unless it had a legitimate and substantial business justification for doing so." J.A. 91.

In each respect, the court of appeals answered—with the benefit of five years of legal development—questions of law that were very much unsettled as of 1985. And, whatever may be true today, the legal uncertainties that existed as of 1985 were more than sufficient to cause ALPA to settle for the proverbial "half a loaf." We therefore outline the various legal issues that could have arisen had ALPA decided to end the strike and make an offer to return to work without any strike settlement agreement. By considering, *from the perspective of the time*, the legal arguments that Continental would probably have made upon those issues, we demonstrate that ALPA had reason to believe that Continental had a sufficient chance of success on one or more of its arguments so that the striking pilots *could* have ended up in a substantially worse position, after years of litigation, than the position created by the negotiated strike settlement.

That, we submit, is more than sufficient to demonstrate that the Union acted not only fairly but rationally. Pp. 39-50 *infra*.

ARGUMENT

I. THE DUTY OF FAIR REPRESENTATION DOES NOT AUTHORIZE JUDGES OR JURIES TO SCRUTINIZE THE RATIONALITY OF A UNION'S GOOD FAITH JUDGMENT TO SETTLE A LABOR DISPUTE

Introduction

The district court granted summary judgment for the defendant union in this duty of fair representation case because that court found, on the basis of undisputed evidence, that ALPA in negotiating an end to its labor dispute with Continental had accepted "the best deal that the Union thought it could construct." J.A. 74.

In overturning that decision, the court of appeals did *not* purport to disagree with the trial court's assessment of the undisputed evidence. Rather, the appellate court took issue with the district judge's statement of the governing legal rule. The Fifth Circuit concluded that a decision by a union to settle a labor dispute may breach the duty of fair representation in situations in which the decision is "based upon relevant, permissible union factors" and is "inclusive of a fair and impartial consideration of the interests of all employees" *if*, in the eyes of a jury, that decision is not "rational" or is "inexplicable." J.A. 88.

The contrast between the approaches of the lower courts in this case is sharp indeed, and mirrors a fundamental division in the lower courts generally.⁵ The district court proceeded on the understanding that the fair representa-

⁵ See, e.g., *Dement v. Richmond, F. & P. R. Co.*, 845 F.2d 451, 457-60 (4th Cir. 1988); *Ratkosky v. United Transp. Union*, 843 F.2d 869, 876-78 (6th Cir. 1988); *Morgan v. St. Joseph Terminal R.R.*, 815 F.2d 1232, 1234 (8th Cir. 1987); *Crusos v. United Transp. Union*, 786 F.2d 970 (9th Cir.), *cert. denied*, 479 U.S. 934 (1986); *Berrigan v. Greyhound Lines, Inc.*, 782 F.2d 295, 297-99 (1st Cir. 1986); *American Postal Workers Union Local 6885 v. American Postal Workers Union*, 665 F.2d 1096, 1098 (D.C. Cir. 1981).

tion duty is designed to assure that all members of a bargaining unit receive *equal* representation; the court of appeals on the understanding that the duty is a broader one guaranteeing at least minimally *adequate* representation.

Thus, the district court ended its inquiry upon finding "nothing to indicate that the Union made any choices among the Union members or the strikers who were not Union members other than on the best deal that the Union thought it could construct," J.A. 74; the appellate court, on the other hand, went further by scrutinizing the Union's settlement decisions in order to ascertain whether the Union had a *sound basis for concluding* that the settlement was "the best deal that the Union . . . could construct."

The court of appeals based its decision on its reading of the portion of *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), stating that the duty of fair representation obligates unions to "avoid arbitrary conduct." If the *Vaca* rule were as far-reaching as the court of appeals posited—and if *Vaca* were properly read to authorize judges or juries to scrutinize the rationality of a union's decision-making in settling a labor dispute with an employer—then, as we demonstrate below, *Vaca* would be directly contrary to *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), the closest precedent to the instant case. In that event, it would be necessary for this Court in order to adjudicate the instant case: (i) to overrule—or otherwise modify—either *Vaca* or *Ford Motor*; or (ii), in the alternative, to delineate the sphere in which *Vaca* controls and the sphere in which *Ford Motor* controls. The issue concerning the interplay between *Ford Motor* and *Vaca*, too, has divided the lower courts.⁶

⁶ Three circuits are of the view that *Ford Motor* governs contract negotiation cases while *Vaca* governs contract administration cases and that *Ford Motor* allows for a greater measure of union discretion in negotiations than *Vaca* allows in grievance handling;

It is our submission that the court of appeals both misread and misapplied *Vaca*. The salient point of this Court's cases from *Steele v. L.&N.R. Co.*, 323 U.S. 192 (1944), to *Steelworkers v. Rawson*, — U.S. —, 58 U.S.L.W. 4556 (May 24, 1990), is that the fair representation duty is an obligation to "*exercise fairly the power conferred upon [the union] in behalf of all those for whom it acts, without hostile discrimination against them.*" *Steele*, 323 U.S. at 203; emphasis added. This Court has never sanctioned review—by judges, juries or administrative bodies—of an honest union effort, not marked by invidious discrimination, to negotiate, to renegotiate or to elaborate on a union-employer agreement. To the contrary, the Court has recognized that regulating the adequacy of union representation is antithetical to the system of free collective bargaining that it is the purpose of the Railway Labor Act, 49 U.S.C. § 151 *et seq.*, and the National Labor Relations Act, 29 U.S.C. § 141 *et seq.*, to establish and that it is the purpose of the fair representation duty to make more coherent and complete.

Thomas v. United Parcel Service, 890 F.2d 909, 916-18 (7th Cir. 1989); *Burkevich v. ALPA*, 894 F.2d 346, 349 (9th Cir. 1980); and *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519-20 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 2066 (1989).

Five other circuits appear to agree with the Fifth Circuit that a single fair representation standard derived from *Vaca* governs across the board: *Eatz v. DME Unit of Local Union Number 3*, 794 F.2d 29, 34 (2nd Cir. 1986); *Masy v. New Jersey Rail Operations, Inc.*, 790 F.2d 322, 327-28 (3d Cir.), *cert. denied*, 479 U.S. 916 (1986); *Morgan v. St. Joseph R. Co.*, 815 F.2d 1232 (9th Cir. 1987); *Eason v. Frontier Air Lines, Inc.*, 636 F.2d 293, 295 (10th Cir. 1981); and *American Postal Workers Union Local 6885 v. American Postal Workers Union*, *supra* (D.C. Cir.).

In the remaining three circuits, the question of whether there is a unitary fair representation standard is an open one: *Berrigen v. Greyhound*, *supra* (1st Cir.); *Smith v. Local 7898, United Steelworkers*, 834 F.2d 93, 96-97 (4th Cir. 1987); and *Ratkosky v. United Transp. Union*, *supra* (6th Cir.).

A. *Vaca v. Sipes* Does Not Authorize Judicial Review of the Adequacy of Union Representation Generally or of the Rationality of Nondiscriminatory Settlement Decisions In Particular

We begin our analysis by following this Court's duty of fair representation precedents from *Steele* forward.

1. *The pre-Vaca v. Sipes Cases*—the fair-representation obligation was, as just noted, first recognized by this Court in *Steele v. L&N.R. Co.*, *supra*. That case involved a challenge to a union's actions in negotiating a collective bargaining agreement whose terms expressly discriminated against black members of the bargaining unit; the Court had little difficulty in concluding that the union had acted unlawfully in so doing.

The *Steele* Court began its analysis by observing that if the RLA empowered unions to negotiate such discriminatory agreements, "constitutional questions arise" because under the RLA "the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates." 323 U.S. at 198. The Court was satisfied, however, that "Congress . . . did not intend to confer plenary power upon the union . . . without imposing on it any duty to protect the minority." *Id.* at 199. "The use of the word 'representative' . . . plainly implies that the representative is to act on behalf of all the employees which, by virtue of the statute, it undertakes to represent" and "is to act for and not against those whom it represents. . . ." *Id.* at 202.

The *Steele* Court went on to elaborate upon the scope of the duty of fair representation in the following terms:

We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the in-

terests of those for whom it legislates. . . . We hold that the language of the Act . . . expresses the aim of Congress to impose on the bargaining representative . . . the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them. [323 U.S. at 202-03; emphasis added.]

The Court hastened to add that "[t]his does not mean" that a union "is barred from making contracts which may have unfavorable effects on some of the members of the craft represented"; to the contrary, "[v]ariations in the terms of the contract based on differences relevant to the authorized purposes of the contract . . . are within the scope of the bargaining representative of a craft." 323 U.S. at 203 (emphasis added). But,

[w]ithout attempting to mark the allowable limits of differences . . . it is enough for present purposes to say that the statutory power to represent a craft . . . does not include the authority to make among members of the craft discriminations not based on . . . relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations. [*Id.*; emphasis added.]⁷

Ford Motor Co. v. Huffman, *supra*, the Court's second major fair-representation decision, further refined the lessons—and clarified the limits—of *Steele*. There a group of long-term Ford employees challenged a collective bargaining agreement granting seniority credit for military service even where the service preceded employment with Ford; the net effect of that agreement was to allow newly-hired veterans to outrank the long term employees. This Court rejected that challenge.

⁷ See also *Railroad Trainmen v. Howard*, 343 U.S. 768, 773 (1952) ("We held [in *Steele*] that the language of the Act imposed a duty on the craft bargaining representative to exercise the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against any of them").

In so doing, the Court started from the premise that the federal labor laws embody "the faith of Congress in free collective bargaining . . . when conducted by freely and fairly chosen representatives of appropriate units of employees." 345 U.S. at 337. The Court went on to recall, however, that "the authority of bargaining representatives . . . is not absolute [as] is recognized in *Steele*." *Id.* Rather, under *Steele*, the "statutory obligation to represent all members of an appropriate unit requires [unions] to make an *honest effort to serve the interests of all of those members, without hostility to any.*" *Id.* (emphasis added).

As in *Steele*, the *Ford Motor* Court was quick to underscore the limits of the fair-representation duty, noting that

Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. . . . Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. *A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.* [345 U.S. at 337-38; emphasis added.]*

Humphrey v. Moore, 375 U.S. 335 (1964)—the third major fair-representation case and one which preceded

* See also *Conley v. Gibson*, 355 U.S. 41, 46 (1957) (duty of fair representation requires a union "to represent fairly and without hostile discrimination all of the employees in the bargaining unit" and "not to draw 'irrelevant and invidious' distinctions among those it represents").

Vaca v. Sipes, *supra*, by just three years—sounds the same theme. *Humphrey* involved a challenge to an agreement dovetailing the seniority lists of two employers, one of which had been acquired by the other. Junior employees of the acquiring employer, who were disadvantaged by the dovetailing, brought suit.

The *Humphrey* Court began by restating the fair representation law as developed through *Steele* and *Ford Motor*:

The undoubted broad authority of the union as exclusive bargaining agent . . . is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation. [Citation omitted.] "By its selection as a bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests *fairly and impartially.*" *Wallace Corp. v. Labor Board*, 323 U.S. 248, 255. The exclusive agent's obligation "to represent all members of an appropriate unit requires [it] to *make an honest effort to serve the interests of all of those members, without hostility to any . . .*" and its powers are "*subject always to complete good faith and honesty of purpose in the exercise of its discretion.*" *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-338. [375 U.S. at 342; emphasis added.]

As in *Steele* and *Ford Motor*, the Court in *Humphrey* then stressed the limits of the duty:

[W]e are not ready to find a breach of the collective bargaining agent's duty of fair representation in *taking a good faith position contrary to that of some individuals whom it represents* nor in supporting the position of one group of employees against that of another. . . . Just as a union must be free to sift out wholly frivolous grievances . . . so it *must be free to take a position on the not so frivolous disputes.* Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these

cases would surely weaken the collective bargaining and grievance processes. [*Id.* at 349-50; emphasis added.]

And the *Humphrey* Court found no breach of duty because

the union took its position *honestly, in good faith and without hostility or arbitrary discrimination*. . . . By choosing to integrate seniority lists based upon length of service at either company, *the union acted upon wholly relevant considerations, not upon capricious or arbitrary factors*. The evidence shows no breach by the union of its duty of fair representation. [*Id.* at 350; emphasis added.]

2. *Vaca v. Sipes*—It was against this background that the Court decided *Vaca v. Sipes*, *supra*. At issue was a union's decision to withdraw, rather than to arbitrate, a grievance of an employee who had been discharged on the ground that he was not physically fit to do the heavy work his job entailed; the Court was called upon to determine whether the challenge to the union's conduct was within the exclusive primary jurisdiction of the National Labor Relations Board and, if not, whether the plaintiff had proven a fair-representation violation.

The *Vaca* Court began its analysis by restating the "now well established" rule that the "Union had a statutory duty fairly to represent all of th[e] employees" in plaintiff's bargaining unit. 386 U.S. at 177. The Court traced that rule back to *Steele* and *Ford Motor*, and summarized the teaching of those cases as follows:

Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. [386 U.S. at 177.]

And the Court concluded that fair representation claims are judicially cognizable, noting that "the duty of fair

representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Id.* at 182.

Having established the lower court's jurisdiction over the plaintiff's claim, the Court went on to consider whether the plaintiff had made out that claim. The Court began by restating the controlling legal standard in words on which the court below in the instant case relied: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U.S. at 190, *citing Humphrey v. Moore*, *supra*; *Ford Motor Co. v. Huffman*, *supra*. And the Court applied that legal standard as follows:

In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances. See *Humphrey v. Moore*, [*supra*]; *Ford Motor Co. v. Huffman*, [*supra*]. . . . [H]ere, the Union processed the grievance into the fourth step [of the grievance procedure], attempted to gather sufficient evidence to prove Owens' case, attempted to secure for Owens less vigorous work at the plant, and joined in the employer's efforts to have Owens rehabilitated. Only when these efforts all proved unsuccessful did the Union conclude both that arbitration would be fruitless and that the grievance should be dismissed. *There was no evidence that any Union officer was personally hostile to Owens or that the Union acted at any time other than in good faith*. . . . [W]e must conclude that th[e] duty was not breached here. [386 U.S. at 194-95; emphasis added.]⁹

⁹ In dictum, the *Vaca* Court suggested that "when Owens supplied the Union with medical evidence supporting his position, the Union might well have breached its duty had it ignored Owens' complaint or had it processed the grievance in a perfunctory man-

3. *The post-Vaca v. Sipes cases—Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971)—decided just four years after *Vaca*—provides an informative gloss on the meaning of the earlier opinion. *Lockridge* arose from a union's action in seeking and obtaining the discharge of a union member who had fallen in arrears in paying his union dues. The question presented was whether *Lockridge's* challenge to the union's action was preempted by the NLRA. The plaintiff sought to avoid preemption by invoking the *Vaca* preemption analysis and arguing, *inter alia*, that "the suit, in essence, was one to redress [the union's] breach of its duty of fair representation."

ner." 386 U.S. at 194. See also *id.* at 191 ("a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion").

This portion of *Vaca*, standing alone, is, admittedly, ambiguous. As Judge Posner has observed, "[p]erfunctory" could "just mean refusing—deliberately refusing—to do more than go through the motions. [Citations omitted.] But it could also cover a case of sheer forgetfulness." *Graf v. E.J. & E. Ry.*, 697 F.2d 771, 778 (7th Cir. 1985). However that may be, we now know that the latter reading of *Vaca* cannot be squared with this Court's subsequent holding that "negligence . . . would not state a claim for breach of the duty of fair representation." *Steelworkers v. Rawson*, — U.S. —, 58 U.S.L.W. 4556, 4559 (May 14, 1990).

Thus, we submit that the *Vaca* dictum is properly read to particularize the legal standard stated in *Vaca* where a union acts with deliberate indifference. For, when a union deliberately ignores a meritorious grievance or processes that grievance in a half-hearted fashion, it is ordinarily fair to assume that the union's decision was based on irrelevant or impermissible considerations such as the identity of the grievant. The Court has subsequently made this very point: "a union breaches its duty when the conduct is 'arbitrary, discriminatory or in bad faith,' as, for example, when it 'arbitrarily ignore[s] a meritorious grievance or processes[es] it in [a] perfunctory fashion'". *Electrical Workers v. Foust*, 442 U.S. 42, 47 (1971).

We do not pause further to pursue the meaning of this aspect of *Vaca* because in this case no claim is made that the Union acted "perfunctorily" in negotiating the agreement under challenge and the court below did not purport to rely on this aspect of *Vaca* in questioning the rationality of the Union's decision-making.

403 U.S. 298. The Court rejected that effort on the ground that *Lockridge* had neither pleaded nor demonstrated the necessary elements of a fair representation claim:

For such a claim to be made out, *Lockridge* must have proved "arbitrary or bad-faith conduct on the part of the Union." *Vaca v. Sipes*, *supra*, [386 U.S.] at 193. There must be "substantial evidence of fraud, deceitful action or dishonest conduct." *Humphrey v. Moore*, *supra*, [375 U.S.] at 348. Whether these requisite elements have been proved is a matter of federal law. . . . [T]hey were not even asserted to be relevant in the proceedings below. [403 U.S. at 299-300.]

The *Lockridge* Court explained why the elements of "fraud, deceitful action, or dishonest conduct" are of the essence to the fair representation cause of action by noting that "this Court's refusal to limit judicial competence to rectify a breach of the duty of fair representation rests upon our judgment that such actions cannot, in the vast majority of situations where they occur, give rise to actual conflict with the operative realities of federal labor policy." 403 U.S. at 301. The safeguard against such a conflict is that

The duty of fair representation was judicially evolved . . . to enforce fully the important principle that no individual union member may suffer invidious, hostile treatment at the hands of the majority of his co-workers. . . . [T]he fact that the doctrine was originally developed and applied by courts, after passage of the Act, and carries with it the need to adduce substantial evidence of discrimination that is intentional, severe and unrelated to legitimate union objectives ensures that the risk of conflict with the general congressional policy favoring expert, centralized administration and remedial action is tolerably slight. . . . If, however, the congressional policies . . . are not to be swallowed up, the very distinction, embedded within the instant lawsuit itself, between honest, mistaken conduct, on the one hand, and deliberate and severely hostile and irrational treatment, on the

other, needs strictly to be maintained. [*Id.* at 301; emphasis added.] ¹⁰

4. *The Lesson of this Court's Decisions*—The foregoing demonstrates that while the phrasing of the fair representation duty has not been entirely uniform over time, the *essential nature* of the duty was set forth in *Steele* over forty years ago and has not been expanded or contracted in the intervening years.

¹⁰ Two other, post-*Vaca* cases shed light on *Vaca* and merit brief mention.

The first is *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), in which the Court held that an employee may pursue a breach of contract suit against his employer even after the dispute has been subject to arbitration if the employee is able to prove that the union breached its duty of fair representation in presenting the grievance to the arbitrator. In reaching this conclusion the Court emphasized the need to assure "some minimum levels of *integrity*" in the grievance procedure, *id.* at 571, and to protect employees where the "process has fundamentally malfunctioned by reason of the bad-faith performance of the union," *id.* at 569. The Court added:

The grievance processes cannot be expected to be error free. . . . But it is quite another matter to suggest that erroneous arbitration decisions must stand even though the employee's representation by the union has been *dishonest, in bad faith, or discriminatory*. [424 U.S. at 571; emphasis added.]

Significantly, the *Hines* Court did not suggest a need to protect union members from inadequate union representation.

Breining v. Sheet Metal Workers, — U.S. —, 110 S. Ct. 424 (1989), evidences the same understanding. In explaining there why state law claims regarding the operation of hiring halls are preempted whereas fair-representation claims are not, the Court reasoned:

The duty of fair representation is different. It has "judicially evolved," *Motor Coach Employees v. Lockridge*, [*supra*, 403 U.S. at] 301, as part of federal labor law—predating the prohibition against unfair labor practices by unions in the 1947 LMRA. *It is an essential means of enforcing fully the important principle that "no individual union member may suffer invidious, hostile treatment at the hands of the majority of his coworkers."* *Ibid.* [110 S. Ct. at 432; emphasis added.]

Steele, as we have seen, creates an equal protection regime that requires the union to "represent all its non-union or minority union members . . . without hostile discrimination, fairly, impartially, and in good faith." 323 U.S. at 204. *Ford Motor* is clearly to the same effect: unions must "make an honest effort to serve the interests of all those members without hostility to any." 345 U.S. at 337. Pp. 14-16, *supra*.

Humphrey v. Moore, as we have also seen, introduces the word "arbitrary" to the fair representation lexicon: the union must, said the Court, act "honestly and in good faith" and must do so "without hostility or *arbitrary* discrimination"; distinctions among employees must be based on "wholly relevant considerations, not upon capricious or *arbitrary* factors." 375 U.S. at 350; emphasis added. Pp. 16-18, *supra*. Plainly the context—particularly the juxtaposition to honesty and good faith—shows that the phrases "arbitrary discrimination" and "arbitrary factors" are being used to signify a differentiation based on such irrelevant considerations as personal favoritism or hostility. To put this another way, "arbitrary" is used as a synonym for "illicit." The point of *Humphrey*, after all, is that "we are *not* ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents." *Id.* at 349. The Court made that point precisely because a union acting in "good faith . . . must be free to take a position on the not so frivolous disputes" and because a legal rule that would limit that freedom would "remove or gag the union in these cases" and, thus, would "surely weaken the collective bargaining and grievance process." *Id.* at 349-50.

Vaca continues to use "arbitrary" in the same sense as *Humphrey*. There is not a word in the *Vaca* opinion so much as hinting at a redefinition of that term or of the duty of fair representation generally; to the contrary, *Vaca's* opinion retraces the development of the

law from *Steele* to that time and does so by citing with approval and quoting from the precedents we have just reviewed. 386 U.S. at 177-178, 182, 190, 194. Moreover, *Vaca*, in sustaining the union's actions there emphasizes that "[t]here was no evidence that any Union officer was personally hostile to Owens or that the Union acted at any time other than in good faith." *Id.* at 194. The Court did *not* purport to evaluate the facts to determine whether the union's judgment on the merits was well reasoned or badly reasoned nor did the Court purport to determine whether the union's judgment was correct or incorrect.

Finally, *Lockridge* restates in the clearest possible terms the teaching of the cases from *Steele* to *Vaca*:

For . . . a [fair representation] claim to be made out, *Lockridge* must have proved "arbitrary or bad-faith conduct on the part of the Union." *Vaca v. Sipes, supra* [386 U.S.] at 193. There must be "substantial evidence of fraud, deceitful action or dishonest conduct." *Humphrey v. Moore, supra* [375 U.S.] at 348. [403 U.S. at 299.]

The governing principle, the *Lockridge* Court continued, is "that no individual union member may suffer invidious, hostile treatment at the hands of the majority of his coworkers." *Id.* at 301.

Against this background, the court of appeals' critical error stands out in bold relief.

Under *Steele* and its progeny, it was perfectly proper for the courts below to ascertain whether ALPA, in deciding to settle the labor dispute with Continental, and in framing the settlement, was carrying out its representational function honestly and in good faith. In so doing, to use some of the court of appeals' words, it was also proper to ascertain whether the Union based its decision on such impermissible factors as "personal animosity or political favoritism." J.A. 88.

Similarly, to the extent the settlement agreement was challenged as sanctioning differential treatment of a sub-

group of the represented employees, *Steele* provides for judicial review to assure that the distinction drawn is one that is "relevant to the authorized purposes of the [agreement]" and not one "like a discrimination based on race" that is "irrelevant and invidious." 323 U.S. at 203. This inquiry, like the first, is a traditional one in equal protection jurisprudence.

The court below went further, however, in authorizing an inquiry into honest, good faith and nondiscriminatory union decision-making in order to ascertain whether there were other options for concluding a strike that could have provided "more favorable treatment" for the complaining strikers and, if so, whether the union had a "rational" explanation for the choice that was made. J.A. 89. It bears particular emphasis that, as far as the court below was concerned, it would be a sufficient basis for liability to conclude that the union chose an option that was in some respects acceptable if that choice "left the complaining employees worse off in a number of respects" than another choice. J.A. 89; emphasis added.

This process whereby a judge—or a jury—evaluates the comparative substantive merits and demerits of the terms and conditions of a labor-management agreement has nothing to do with the evaluation of the union's honesty and good faith in negotiating such agreements called for by this Court's fair representation precedents. Nothing in *Vaca*, its predecessors, or its progeny justifies such a radical reworking of the law as it has stood since *Steele* was decided. For this reason alone the decision below must be reversed.

B. The National Labor Policy Does Not Permit Judicial Review of the Adequacy of Union Representation Generally or of the Rationality of Nondiscriminatory Settlement Decisions In Particular

The foregoing establishes that, strictly as a matter of precedent, the court below erred in reading *Vaca* as establishing a minimum standard of adequate representa-

tion regulating the caliber of non-discriminatory union decision-making. As we now show, precedent aside, neither the RLA nor the NLRA is susceptible to being read as imposing such a duty. To the contrary, important aspects of the national labor policy would be seriously undermined if the courts were to assume on their own such a regulatory authority.

(1) At the threshold, it is important to bear in mind that although the duty of fair representation is not expressly provided for in either the RLA or the NLRA, that duty is, nonetheless, a "statutory duty," *Vaca*, 386 U.S. at 177, one that has been "implied from the statute and the policy which it has adopted," *Steele*, 323 U.S. at 204; *Electrical Workers v. Foust*, *supra*, 442 U.S. at 47. Those sources necessarily define the limits of this statutory duty as well. We therefore begin by reviewing the fundamentals of the national labor policy.

Since the enactment of the RLA and the NLRA, "the story of labor relations in this country has largely been a history of governmental regulation of the process of collective bargaining." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970). These laws are "[p]redicated on the assumption that individual workers have little, if any, bargaining power, and that 'by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours and working conditions.'" *Barentine v. Arkansas-Best Freight System*, 450 U.S. 728, 735 (1981), quoting *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

Accordingly, where an employee group freely chooses union representation, both laws impose on employers the duty to bargain collectively with the "chosen representative" over the employee's terms and conditions of employment. In that circumstance, both the RLA and the NLRA "extinguish[] the individual employee's power to

order his own relations with his employer and create[] a power vested in the chosen representative to act in the interests of all employees." *NLRB v. Allis-Chalmers*, *supra*, 388 U.S. at 180. In this way "a general process [is] established" to "ensure that employees as a group [can] express their opinions and exert their combined influence over the terms and conditions of their employment." *H.K. Porter Co. v. NLRB*, *supra*, 397 U.S. at 163.

At the same time, and precisely because the national labor policy relies on a collective bargaining process rather than on public law for the "ordering and adjusting of competing interests," *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962), that policy does not provide for "governmental regulation of the terms and conditions of employment." *H.K. Porter Co. v. NLRB*, *supra*, 397 U.S. at 103. "The goal of federal labor policy . . . is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations." *Teamsters Union v. Oliver*, 358 U.S. 283, 295 (1959). Congress thus "intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *Labor Board v. Insurance Agents*, 361 U.S. 477, 488 (1960). And, "[i]f the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution." *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 219 (1979).

(2) The duty of fair representation, as recognized in *Steele* and as applied by the district court in the instant case, fits comfortably within—and, indeed, is integral to—this collective bargaining system. As *Steele* recognizes, that system would be internally incoherent—and constitutionally suspect—if the labor laws provided for *exclusive* representation without also mandating *fair* representation of all those within the represented group.

Thus, as *Steele* concludes, "[t]he fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and is to act for and not against those whom it represents." 323 U.S. at 202. This is "a correlative duty 'inseparable from the power of representation.'" *Electrical Workers v. Foust*, *supra*, 442 U.S. at 46.

Equally to the point, as articulated in *Steele*, the duty of fair representation is one that the judiciary can readily apply by invoking norms and concepts familiar to the law that do *not* interfere with the "wide latitude" labor policy accords employers and employees to "establish their own charter for the ordering of industrial relations." P. 27 *supra*.

Steele expressly equates the union's statutory duty "to protect equally the interests of the members of the craft" and the duty "the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates." 323 U.S. at 202. The courts are, of course, well-accustomed to elaborating and enforcing this constitutional norm. That being so, requiring unions to provide such equal representation—and precluding union decision-making on "irrelevant [or] invidious" grounds, *Steele*, 323 U.S. at 203—does *not* inject the government into the substance of the collective bargaining process.¹¹

(3) It is one thing to imply and enforce a duty of *fair* representation, and quite another to imply and enforce a duty of *adequate* representation, one that seeks to regulate the soundness of even honest, non-discrimina-

¹¹ Even so, elaborating upon this limited duty can pose confounding problems in the real world of labor relations in which all too often inadequate resources must be divided and hard questions arise as to what are "relevant" or "legitimate" grounds for determining who receives those benefits in what amounts. See Freed, Polsby & Spitzek, *Unions, Fairness, and the Conundrums of Collective Choice*, 56 S.Cal.L.Rev. 461 (1983).

tory union decisions. The former does not necessarily encompass the latter because, as Judge Easterbrook has put it, "[r]epresentation is 'fair' even if ineffectual," *Antrim v. Burlington Northern, Inc.*, 847 F.2d 375, 378 (7th Cir. 1988). While a system of exclusive representation demands *equality* of representation if that system is to function properly, the proposition that unions are the statutory representatives of all (rather than some) employees within the bargaining unit does *not* demand that the *quality* of union representation is to meet specified standards set by, and enforced through, public law. Thus the statutory predicates underlying *Steele's* recognition of a duty of "fair representation" do not entail the recognition of a duty of *adequate* representation.

It is, moreover, of the essence that any attempt by the courts to regulate the quality of union representation by reviewing the soundness of decisions made by unions in the course of dealing with employers would undermine the national labor policy. Subjection of such union decisions to judicial scrutiny not merely as to the union's *bona fides* but as to the union's rationality inevitably would put judges and juries, to a greater or lesser extent, in the position of reviewing the competence of union negotiators and decision-makers and of evaluating the soundness of their judgments. If a union were unable to satisfy the judge or jury on these scores, the union's decision could not stand. The necessary result would be to make the courts—rather than employers and employees—the final arbiters of the terms and conditions of union-management agreements thereby producing through the back door the very result Congress refused to legislate in the RLA and the NLRA.

The instant case illustrates the point well. When all is said and done, plaintiffs here challenge the wisdom of ALPA's decision to settle with Continental; it is the plaintiffs' theory that the bargaining unit employees would have been better served had the employees uncon-

ditionally offered to return to work without a settlement agreement. The Fifth Circuit, in the decision below, agreed to entertain that challenge absent any evidence that the Union was motivated by extraneous—much less invidious—considerations in deciding to settle, and that court left it to a jury to decide whether the Union's judgment in settling was, in the jury's view, a "rational" one.

But under our national labor policy it is *not* for the government—either legislatively or judicially—to decide whether a group of striking employees would be better served by settling or by capitulating to the employer without a settlement; that is precisely the type of decision that is for the employees to make through their chosen representative.

The threat to private decision-making posed by the ruling below is especially severe in light of the process contemplated by the lower court for testing the rationality of union decisions. In the nature of things, the judgments unions are called upon to make in their dealings with employers are *practical* judgments about what is achievable under the circumstances that obtain. Those decisions must be made in the heat of economic battle, and in situations in which the most critical factor—the employer's needs and wants—is beyond the union's control and beyond the union's accurate prediction.

Yet under the decision below, review of those decisions would be vested in a judge—or in lay jurors—who are wholly outside the ongoing labor relations system in which the decisions are played out, and who would be reviewing the decisions *post hoc* and with the full benefit of hindsight. Decisions which made good sense in context, and to the active participants, may be perceived quite differently by outsiders reviewing the decisions in a different setting and at a different time. Thus the danger that judges and lay jurors will assume for themselves the responsibility to decide what is best for union mem-

bers is great indeed as the decision below so amply demonstrates.

(3) Rather than authorizing the courts to police the quality of the representation provided by unions, Congress has chosen a very different course to protect union members from inadequate representation: through the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401 *et seq.* ("LMRDA"), Congress has sought to "ensur[e] that unions would be democratically governed and responsive to the will of their memberships." *Finnegan v. Leu*, 456 U.S. 431, 436 (1982).

Two Titles of the LMRDA are especially relevant here. Title IV of the LMRDA extensively regulates the electoral process within labor unions "to insure 'free and democratic elections.'" *Furniture Moving Drivers v. Crowley*, 467 U.S. 526, 539 (1984); towards that end, Title IV requires that union officers be elected at periodic intervals, 29 U.S.C. § 481(a); Title IV grants all members the right to run for union office and to vote in union elections, *id.* § 481(e); and Title IV controls the campaign process and the balloting to assure fair elections, *id.* 481(a), (b), (c), (e). In addition, LMRDA Title I—the "Bill of Rights" for union members—grants union members individually certain rights (such as the right of free speech and assembly and the right of due process in disciplinary proceedings), *see* LMRDA § 101(a)(2), (a)(4), 29 U.S.C. § 411(a)(2), (a)(4), and grants union members collectively the right to decide upon "the rates of dues and initiation fees payable by members," LMRDA § 101(a)(3), 29 U.S.C. § 411(a)(3).

Of course, as Judge Posner has observed, "union democracy no more guarantees a minority against oppression by the majority than political democracy does," *Dober v. Roadway Express Inc.*, 707 F.2d 292, 295 (7th Cir. 1983), and thus the LMRDA in no sense obviates the need for a duty of *fair* representation. But as Judge Posner goes on to note, in light of the LMRDA, union

members "do not need [judicial] protection against representation that is inept but not invidious" because if a "union does an incompetent job . . . its members can vote in new officers who will do a better job or they can vote in another union." *Id.*

Indeed any effort to judicially impose standards of minimum representation upon unions would threaten the policies underlying the LMRDA as well as the policies underlying the collective bargaining system itself. Under the LMRDA, it is for union members to decide upon the degree of experience, judgment and the like that they desire in their leaders;¹² the courts thus have no business imposing standards requiring a certain level of training and experience. And under the LMRDA it is for union members to decide upon the level of union dues and on how those dues will be spent; the courts may not impose standards of representation that limit the freedom of members to make such judgments.¹³

¹² Under the LMRDA union members are guaranteed the right to select the decision-makers for the union; indeed, unions are not free to establish experience or similar qualifications to hold union office because "the assumption is that voters will exercise common sense and judgment in casting their ballots." *Steelworkers v. Usery*, 429 U.S. 305, 309 (1977). See also *Wirtz v. Hotel Employees*, 391 U.S. 492 (1968); *Wirtz v. Bottle Blowers Ass'n*, 389 U.S. 463 (1968); *Wirtz v. Laborers' Union*, 389 U.S. 477 (1968).

¹³ As Judge Easterbrook has observed, under the LMRDA it is for union members to "choose the level of care for which they are willing to pay." *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242, 244 (7th Cir. 1986):

A union could secure the skills and perseverance of a good litigation team only by paying the steep fees these skills command in the market. A union may choose to rely on part-time, untrained overworked grievors—with the inevitable difference in the outcome of some cases—rather than purchase a higher quality of representation. A union may conclude that its limited resources should go into a strike fund or toward negotiating the next contract. [*Id.* at 245.]

(4) Finally, there are some "intensely practical considerations," *Vaca*, 386 U.S. at 183, that militate against requiring a union to satisfy a jury that the union's decision to resolve a dispute with an employer was "rational."

If unions were called upon to defend not only the *bona fides* but also the rationality of their collective bargaining decisions, each union defendant would be forced to expose in a public proceeding its entire internal thought processes in minute detail. The union would have to explain its assessment of its own—and the represented employees'—strengths and weaknesses. At the same time, the union would have to reveal its information on the employer's wants and needs, and the union's evaluation of the employer's bargaining strengths and weaknesses. All of that information inevitably would be of enormous value to the employer in its ongoing dealings with the union.

Indeed, in a regime in which unions were forced to defend the rationality of their settlement decisions, the ultimate determination of liability could well turn on whether the employer chose to confirm or contest the union's assessment of the relative positions of the parties. An employer interested in its long-run interests in dealing with the union could lend a vital hand to the union's defense; an employer bent on achieving an immediate advantage could offer aid and comfort to the fair-representation plaintiff. In either event, the reliability of the fact-finding process would be open to serious question.

(5) All of the considerations just reviewed militate against imposing minimum standards of adequate representation upon unions in the performance of their representation functions. Having said that much, it is only fair to go on to say that a rule that demands fair—as distinguished from adequate—representation will inevitably result in "hard cases" in which bargaining unit members do not have judicial protection against ineffectual, careless, or even thoughtless representation. In

the final analysis, the question posed here is whether the Court ought to imply an employee right and cause of action that would attend to such cases.

The creation of any such right and remedy, we submit, is peculiarly a legislative—not a judicial—task. As a general matter, it is for Congress to define the rights, duties, and liabilities arising under federal statutes; “the essential predicate for implication of a private remedy simply does not exist” unless “such ‘congressional intent can be inferred from the language of the statute, the statutory structure, or some other source.’” *Karahalios v. Federal Employees*, — U.S. —, 109 S. Ct. 1282, 1286 (1989).

That general caution is very much to the point here for two reasons. First, there is nothing in the RLA—the statute under which this action arises—that suggests a congressional intent to regulate the quality of representation provided by unions. Second, as we have just shown, creation of an “adequate” representation rule exacts large costs to the collective bargaining system for any gains achieved. Particularly given the delicacy of the balances Congress has struck in crafting the national labor policy—and Congress’ insistence since the 1930s that labor policy should be a legislative policy and not a judicial policy, *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 382-83 (1969)—the determination as to whether the potential benefits outweigh those potential losses is peculiarly one for Congress to make.

(6) Our showing to this point demonstrates that the labor laws provide a guarantee to employees of honest, good faith union representation, not of adequate, rational representation. But, we would be derelict in our responsibilities in *this* case if we did not add that a lesser demonstration suffices to require reversal of the decision below.

This case, as we have emphasized, concerns the settlement of a strike through the negotiation of a union-

management agreement. Plainly the dangers to the free collective bargaining system posed by judicial review of the substance of union decision-making are most urgent in this context.

In this society there is no agreed-on calculus for determining how much is management’s, how much is labor’s and how much of what is labor’s is for any particular group of workers. It is precisely because that is so that such determinations are largely made through negotiations (or through market exchanges) and not through government decree. And even assuming that there were such a calculus of distributive justice, the collective bargaining system is not designed to guarantee just results. “The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. . . . ‘In one aspect collective bargaining is a brute contest of economic power somewhat masked by polite manners and voluminous statistics.’” *Labor Board v. Insurance Agents*, 361 U.S. 477, 488-489 (1960), quoting Cox, *The Duty To Bargain In Good Faith*, 71 Harv.L.Rev. 1401, 1409.

Given all these considerations, union-management negotiations provide the last situation in which judicial review of the rationality of the parties’ decision-making should be permitted.

Of at least equal moment, neither of this Court’s two prior fair representation cases that arose in the context *Ford Motor*, *supra*—contain so much as a word suggesting the kind of far-reaching review of the substance and quality of union decision-making called for by the decision below. To the contrary, *Ford Motor* states that the union’s obligation is one of “complete good faith and honesty of purpose in the exercise of its discretion.” 345 U.S. at 338. Indeed, the court below rested its decision entirely on *Vaca v. Sipes*’ formulation of the fair representation duty and most particularly on *Vaca*’s condemnation of “arbitrary” union actions. *Vaca*, however, did

not arise in the negotiation context but rather in a context in which the union was evaluating the merits of a discrete contract grievance. By any measure of complexity and delicacy, the union's task in evaluating such a grievance is qualitatively different from the negotiation task ALPA was called on to perform here.¹⁴ For all the reasons we have given, we do not believe that the *Vaca* Court intended the kind of rationality review called for in the decision below even in the situation presented in *Vaca*. But however that may be, we add at this point that if we are wrong in that regard, the Court should hold that it is the *Ford Motor* standard—and not the *Vaca* standard—that governs this—and similar—negotiation cases. See *Thomas v. United Parcel Service, Inc.*, 890 F.2d 909, 916-917 (7th Cir. 1989).

C. ALPA Satisfied Its Duty of Fair and Equal Representation in Settling the Strike at Continental

The remaining question is whether, applying the proper legal standard as developed in the cases from *Steele* to *Lockridge*, the district court acted properly in granting summary judgment to ALPA. That question can be answered in brief compass.

(1) As the court of appeals stated, plaintiffs' "most fundamental complaint" is that ALPA should have "sim-

¹⁴ We formulate the situation presented in *Vaca* as we do to underline the point that unions perform a range of tasks in the elaboration and enforcement of collective bargaining agreements many of which are akin to, or partake of, the negotiation and renegotiation of the agreement. "The grievance procedure is . . . a part of the continuous collective bargaining process." *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 582 (1960). And, as *Ford Motor*—which concerned the renegotiation of an agreement during its term—shows, it is the *Ford Motor* standard rather than any "adequate representation" standard that fits these more complex contract administration situations.

It is precisely because linedrawing of this kind is inherent in a bifurcated fair representation scheme and creates distinctions more nice than obvious that we argue in the text that the right rule is a single "honesty and good faith" gauge.

ply given up the strike effort and offered to return to work." J.A. 89. But that complaint goes solely to the adequacy—rather than the fairness—of the representation ALPA provided. The only relevant question is whether ALPA's judgment was infected by illicit or other similarly irrelevant considerations. And the district court found, on the basis of the undisputed evidence, that the union acted in complete good faith. That being so, there is nothing left to plaintiffs' "most fundamental complaint."

(2) The plaintiffs here also claim that the settlement agreement "impermissibly discriminated against strikers." J.A. 93. That the settlement does discriminate—in the sense of treating strikers and non-strikers differently—cannot be denied; the agreement permits Continental to allocate certain 85-5 bid positions to strikers and others to non-strikers. But such a discrimination is hardly "impermissible."

As the Court in *Steele* observed, "[v]ariations in the terms of the contract based on differences relevant to the authorized purposes of the contract are within the scope of the bargaining representative of a craft." 323 U.S. at 203. The differentiations here could not be more "relevant": faced with the reality that 1600 pilots were non-strikers and only 1000 pilots were strikers, and an employer who insisted that all promotion opportunities for the foreseeable future had been finally and lawfully awarded to the non-strikers, ALPA negotiated a settlement agreement acknowledging the situation as it was and coming to grips with the problem by allocating scarce resources—jobs—between the two competing groups. Plainly, ALPA did not exceed its discretion in negotiating this agreement.

First of all, there can be no doubt that Continental had the prerogative to restructure its employment rules in ways that would have the result of enhancing the comparative employment position of nonstrikers. It is equally plain that once the Company had done so, the striking pilots would not, as a matter of public law, have been

entitled to any of the benefits ALPA obtained for the strikers as a class in the settlement agreement. This Court's decisions from *Labor Board v. Mackay Co.*, 304 U.S. 333 (1938), to *Trans World Airlines v. Independent Federation of Flight Attendants*, — U.S. —, 109 S. Ct. 1225 (1989), so hold.

Thus, the discrimination claim here reduces to the proposition that a union that concludes that an employer may well have acted within its rights during a strike in reallocating job rights and that negotiates a strike settlement recapturing *some* of those job rights for strikers as a class that is above and beyond what public law would provide is *guilty of invidious discrimination against the strikers*. On that proposition, a union can only negotiate a strike settlement if all the strikers agree that they have no viable public law claims *and* if the union succeeds in placing all the strikers in the employment position they would have occupied if no permanent replacements had been hired and no strikers had abandoned the strike to return to work.

To state that proposition is to refute it. *See, e.g., Metropolitan Edison v. NLRB*, 460 U.S. 693, 705-06 (1983); *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974); *Gem City Ready Mix Co. & Jack Roberts*, 270 N.L.R.B. No. 1260 (1984) (all recognizing a union's broad authority to negotiate modification of both statutory and contractual rights in order to end a strike, to regain jobs, or to achieve other valid labor objectives).

In support of its ruling on the discrimination claim, the court of appeals noted that the strike settlement limited the opportunity for promotion available to recalled strikers during the transitional period at the end of the strike and stated that this result is "inherently destructive of employee rights" on the ground that the "Supreme Court has expressed special concern for post-strike working conditions which 'create' a cleavage . . . [between employees] who stayed with the union and those who returned before the end of the strike and thereby

gained extra seniority.'" J.A. at 93, quoting *NLRB v. American Olean Tile Co.*, 816 F.2d 1496 (6th Cir. 1987), and *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

The court of appeals' position in this regard fails to do business with—and in any event cannot be squared with—this Court's *TWA v. IFFA* decision. In that case, the plaintiffs argued that a carrier's refusal to displace crossovers with senior strikers after a strike constituted unlawful discrimination under *Erie Resistor* on the theory that such a refusal "will create a 'cleavage' between [strikers and non-strikers] 'long after the strike is ended.'" 109 S.Ct. at 1231 (quoting *Erie Resistor*, 373 U.S. at 231). This Court "reject[ed] this effort to expand *Erie Resistor*." 109 S.Ct. 1232.¹⁵

Yet the very same argument is made by the plaintiffs here and was given credence by the court below. The Fifth Circuit's decision thus directly conflicts with *TWA v. IFFA*.¹⁶

II. ALPA'S DECISION TO ENTER INTO THE SETTLEMENT AGREEMENT WITH CONTINENTAL WAS ENTIRELY RATIONAL

Our showing in Part I establishes that under the proper legal standard, the Union did not breach its duty of fair representation. We now show that the same conclusion is required even under the legal standard adopted by the court of appeals in this case.

¹⁵ *Erie Resistor*, moreover, involved a unilateral action changing seniority list so that all non-strikers would be permanently senior to the strikers. In contrast, the order and award is directly analogous to the post-strike carrier conduct approved in *TWA v. IFFA*. *See* 109 S. Ct. at 1231.

¹⁶ The court of appeals noted that the plaintiffs here had raised fair representation claims based on the fact that the strike settlement was not presented to the MEC for ratification and on alleged oral promises of ratification by the membership-at-large. In considering these claims the court below correctly noted that "the union members had no right to approve the settlement embodied in the order and award." J.A. 97. And the district court was correct in concluding that the plaintiffs presented no probative, admissible evidence on either claim.

A. As we have seen, the Fifth Circuit in this case held that to be non-arbitrary the union's decision must be the "rational result of the consideration of [relevant, permissible union] factors." That court recognized that even its expansive test of liability "requires more than a showing of negligence or 'honest, mistaken conduct,'" and that "it is insufficient to show merely 'that the union improperly balanced the rights and obligations of the various groups it represents.'" J.A. 88. But without further elaborating on its understanding of the "rationality" concept, the appellate court ruled that in this case a jury could find that "the settlement agreement . . . was so less favorable to the striking pilots than the likely consequences of a total surrender of the strike effort" as to render ALPA's agreement "irrational." J.A. 97.

In reaching this latter conclusion, the court of appeals proceeded from three legal premises: first, had ALPA surrendered unilaterally, "the returning strikers, as [Continental] employees, were entitled to reinstatement as vacancies occurred" (J.A. 90); second, the "bid positions [covered by the 85-5 bid position offer] were not filled"—and hence were deemed to be vacancies—"until pilots were trained and serving in these positions" (J.A. 92); and third, that in filling these so-called vacancies, "if the pilots had unconditionally agreed to return to work, [Continental] could not have changed its policy of assigning work by seniority . . . unless it had a legitimate and substantial business justification for doing so." J.A. 91. These premises formed the predicate for the appellate court's conclusion that a "jury could find that the order and award left the striking pilots worse off . . . than complete surrender." J.A. 89.

We show in a moment that in each respect, the court of appeals has answered—with the benefit of five years of legal development—questions of law that were very much unsettled as of 1985, and that, whatever may be true today, the legal uncertainty that existed as of 1985 made it entirely sensible for ALPA to settle for the pro-

verbial "half a loaf." Before turning to the legal climate as it existed in 1985, one preliminary observation is in order.

Even if it were true—contrary to what we show below—that the rights of returning strikers under the RLA had been settled as of 1985, and that the settlement agreement ALPA reached gave the strikers fewer recall rights than had been definitively declared to be theirs under the RLA, it still would not follow that the settlement is irrational.

To begin with, the settlement agreement also granted a severance pay option to the strikers, an option which the pilots would not otherwise have enjoyed as a matter of law. Furthermore, the settlement agreement provided for bankruptcy court enforcement jurisdiction and thus created a forum for ALPA to be heard on matters of concern to the striking pilots. Of at least equal moment, by securing Continental's agreement to the settlement, ALPA succeeded in pretermittting any and all litigation over the recall of the strikers and thereby assured that a certain number of pilots would enjoy immediate recall rights without having to forego their livelihoods during protracted litigation. Thus, looking at the matter most favorably to the complaining pilots, it *cannot* be said that if the settled law in 1985 was what the court of appeals posited, the settlement was irrational. Having said that much, we now meet the court of appeals' opinion on its own ground.

B. At the time ALPA made its strike settlement decisions, the Union was faced with a complex set of largely undetermined legal questions. The paucity of pertinent legal precedent existed for two reasons: First, until the airline industry labor disputes of the 1980's, there were very few decided RLA cases concerning the relative rights of striking employees, nonstriking employees, and permanent strike replacements, for the simple reason that there had been, until the deregulation of the airline industry, few instances in which employers governed by

the RLA had attempted to operate during a strike with permanent replacements or crossovers.¹⁷

Second, even to the extent that NLRA case law is properly imported into the RLA context—itsself a debated question in 1985—that case law was not particularly informative in assessing the likely legal rights of the employees ALPA was representing during the Continental strike. That is so because those questions concerned practices common in the airline industry and having no clear counterpart outside that industry.

In our view it facilitates analysis to outline the various legal issues that could have arisen had ALPA MEC decided at its September, 1985 meeting to end the strike and make an offer to return to work without any strike settlement agreement. This approach permits us to consider, *from the perspective of the time*, the legal arguments that Continental would probably have made upon those issues, and assess whether ALPA had reason to believe that Continental had a sufficient chance of success on one or more of its arguments so that the striking pilots *could* have ended up in a substantially worse position, after years of litigation, than the position created by the negotiated settlement.¹⁸

¹⁷ See Airline Deregulation Act of 1978, 49 U.S.C. 1301 *et seq.* See Brief of the Airline Industry Industrial Relations Conference in *Trans World Airlines Inc. v. Independent Federation of Flight Attendants*, No. 87-548, at 22 (explaining that “[i]n the extraordinarily competitive post-deregulation airline industry, an air carrier confronted with a work stoppage of any duration has a strong impetus to attempt to operate”).

¹⁸ The court of appeals relied in part upon evidence that, in its view, indicated that whether or not legally obligated to do so, Continental would have returned striking pilots to work according to seniority, and would have “permitted strikers to bid for vacancies according to [the airline’s] seniority-based assignment procedures.” J.A. 91.

This disregards, in the first place, the basic difference between the Union and Continental concerning whether or not the jobs awarded in the 85-5 bid were “vacant.” See pp. 46-47, *infra*.

That certain arguments were being made by employers in RLA cases at the time, and discussed by the courts as at least credible interpretations of the statute, indicates that Continental would have vigorously pursued the same line and that those issues would arise in any litigation over the rights of returning strikers, and raises the possibility that the arguments would be upheld by the courts in adjudicating the rights of the returning strikers.

1. *The General Protection Accorded Economic Strikers Under the RLA:* As of October, 1985, no case in this Court had ever addressed in any respect the parameters of the right of strikers covered by the RLA to reinstatement after a primary economic strike, nor were there any decided cases in the courts of appeal adjudicating on the merits the question of the statutory relief available to legal economic strikers who contend that their RLA rights had been compromised by the replacement rights accorded them upon abandonment of the strike. And, in the lower courts, employers were maintaining that RLA § 2, Third and Fourth of the RLA, unlike NLRA §§ 8(a)(1) and (3), either provide no protection whatever to strikers seeking to return to work after an economic strike, or do so only under much more limited circumstances than those under which strikers’ reinstatement rights are protected under the NLRA.

Additionally, given the hostile relationship between the Union and the Company, the Union certainly had reason, in protecting the interests of the employees, to be suspicious of any gratuitous representations made by Continental, and to assess the situation instead upon the basis of what *enforceable* right the strikers would have under the RLA were they to offer to return to work without any strike settlement agreement to define their rights. Indeed, the fact that there was at the time a lawsuit pending between Continental and the union in which Continental was attempting to void all bids offered by strikers pursuant to the 85-5 bid, see p. 3, *supra*, provided ample reason to discount any employer suggestions of intent to permit returning strikers to participate in that bid on a strict seniority basis.

See *International Ass'n of Machinists v. Northwest Airlines, Inc.*, 673 F.2d 700 (3d Cir. 1982).¹⁹

For example, in *Air Line Pilots Ass'n International v. United Air Lines, Inc.*, 614 F. Supp. 1020 (N.D. Ill. 1985), affirmed in part and reversed in part, 802 F.2d 886 (7th Cir. 1986), cert. denied, 480 U.S. 946 (1987), a case in which ALPA was a party, the employer argued strenuously both in the district court and, one month after the settlement in this case, in the court of appeals, that the range of permissible employer self-help after exhaustion of the RLA dispute resolution mechanisms is much broader than the range of permissible self help under the NLRA. See 802 F.2d at 897.

In particular, the employer in that case maintained that RLA § 2, Third and Fourth do not parallel NLRA §§ 8(a)(1) and (3), because those sections were intended to apply only in the initial organizing context, and were directed at concerns with company unionism. 802 F.2d at 914-15. While ALPA vigorously contended otherwise in the *United Air Lines* litigation (see *id.*), and although the district court in *United Air Lines* held that RLA § 2 is comparable to NLRA § 8(a)(1) and (3) for purposes of determining the rights of strike replacements (614 F. Supp. at 1041), the court of appeals, in deciding *United Air Lines* treated the employer's arguments as substantial ones and did not reject those arguments in their entirety. See 802 F.2d at 897-98.²⁰

¹⁹ Several of the cases addressing the right of strikers to reinstatement under the RLA inclined toward the position that the reinstatement rights of RLA strikers were not settled by NLRA procedures, cases and concepts. See *Flight Engineers v. Eastern Airlines*, 359 F.2d 303, 307-309 (2d Cir. 1966); *National Airlines v. International Ass'n of Machinists*, 416 F.2d 998 (5th Cir. 1969); *National Airlines v. International Ass'n of Machinists*, 430 F.2d 957 (5th Cir. 1970); and *Empresa Ecuatoriana de Aviacion v. District Lodge No. 100*, 690 F.2d 838 (11th Cir. 1982) (all involved the reinstatement rights under the RLA participants in illegal strikes); *International Brotherhood of Teamsters v. Pan American World Airways*, 607 F. Supp. 609, 614 & n.5 (E.D.N.Y. 1985).

²⁰ Thus, the Seventh Circuit stressed that "simply because a practice [concerning strike replacements] is deemed unlawful

When this Court, a few years later, did have before it a case concerning the replacement rights of economic strikers under the RLA, *Trans World Airlines v. Independent Federation of Flight Attendants* ("TWA v. IFFA"), — U.S. —, 109 S. Ct. 1225 (1989), the question of the overall scope of protection accorded economic strikers under RLA § 2, Third and Fourth remained a live one with members of the Court expressing sharp disagreement concerning the scope of the employee protections afforded by § 2, Third and Fourth. Compare 109 S. Ct. at 1234-35 (majority opinion) with *id.* at 1235-36 (Brennan, J., dissenting) and *id.* at 1240-42 (Blackmun, J., dissenting).

The court of appeals opinion in this case, in describing the legal climate against which the settlement was negotiated, entirely disregarded these fundamental issues concerning the scope of striker protection under the RLA. The court below relied instead upon decisions of this Court, the court of appeals, and the National Labor Relations Board ("NLRB") decided under NLRA §§ 8(a)(1) and (3) as if the NLRA precedents were directly applicable. J.A. 91. But as this Court has cautioned, the NLRA has "no direct application" to the RLA and at most serves as an interpretive analog. *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 377 (1969).

Against that background, and regardless of how this issue would have been resolved on the merits in litigation between Continental and ALPA, it was unquestionably rational for ALPA to assume in 1985 that any attempt by ALPA to invalidate the 85-5 bid as contrary to the

under the NLRA does not automatically transfer into a finding that the same practice is unlawful under the RLA." 802 F.2d at 898. See also *id.* (not deciding whether the broad, *per se* rule of *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), against super-seniority for strike replacements applies under the RLA, and instead affirming the holding below as to the validity of a system-wide rebid during the strike on narrower, fact-based ground); *id.* at 914-15 (rejecting other ALPA arguments based on analogies to the NLRA).

RLA would be vigorously opposed by Continental on the ground that RLA § 2, Third and Fourth provide no protections to returning strikers that would justify invalidating the Company's allocation of seniority rights.

2. *The Validity of the 85-5 Bid*: At the time of the settlement decision, Continental had already awarded jobs under the 85-5 bid to the pilots then working that provided for its upcoming pilot training and staffing. The question whether Continental could be legally compelled to cancel the awards made under the bid in order to permit participation, on a seniority basis, by the returning strikers, again, presented substantial legal uncertainties.

First, as noted above, Continental at the time of the negotiations had rejected the collective bargaining agreement in the bankruptcy proceedings, and was contending that ALPA no longer represented the pilots at all. Consequently, there was the possibility that Continental could have unilaterally abandoned seniority for any and all purposes *within* the pilot workforce, including the job bidding process. Thus, even a successful attempt to upset the 85-5 bid would not have assured the returning strikers of upcoming vacancies in seniority order.

Second, the question whether or not the jobs awarded in the bids were "vacant" because the employees to whom the jobs had been promised would not actually go to work in those jobs for some time, or were "filled" because the commitments had been made and the past practice and particular training and scheduling needs of airlines may justify reliance on advance commitments, was a substantial one. Continental has contended that the Company had a legitimate and substantial business justification for limiting the 85-5 bid awards to working pilots; *viz.*, so that the training and planning necessary for an efficient expansion of the airline could be carried out in an orderly manner. ALPA, of course, had the rejoinder that the 85-5 bid positions remained subject to bidding by returning strikers in an unconditional return to work until the working pilots awarded the 85-5 bid positions actually

began training for or flying in these positions. But the RLA case law as of 1985 simply did not provide a basis for determining with any certainty whether the Union's argument would carry the day.

While the court of appeals viewed the district court opinion in *ALPA v. United Airlines* as dispositive on this question, a single district court opinion, hotly contested on appeal, can hardly be viewed as sufficiently certain legal precedent to eliminate all concern about sustaining the union's position in another district court, in a different circuit, on different facts.

Generalities aside, the particular fact-bound district court holding in *ALPA v. United* offered the most limited support to the Continental pilots. The employer in *ALPA v. United* declared every pilot position "vacant" as of the first day of the strike and attempted to rebid the entire airline with non-strikers after the strike ended 29 days later. 614 F. Supp. at 1039. The district court ruled that the employer lacked any business justification for implementing this system rebid and had attempted to do so solely out of an attempt to destroy ALPA. 614 F. Supp. at 1045-46. Continental, by contrast, had posted the 85-5 bid to meet operational needs in expanding the airline in the ordinary course of business under work rules that continued during the strike and advanced credible business justifications for locking in the 85-5 bid positions awarded to working pilots. At best, there was substantial doubt that ALPA could demonstrate (after years of litigation) that Continental intentionally posted and awarded the 85-5 bid without regard to business objectives and for the overriding purpose of undermining ALPA.²¹

²¹ Indeed, ALPA's concerns were subsequently confirmed by the Seventh Circuit's narrow affirmance of this aspect of *ALPA v. United* on appeal. The Seventh Circuit ruled that the United rebid in favor of non-strikers might be permissible under the RLA even after the strike if United could have shown that the rebid was necessary as the "first step in rebuilding the airline's pilot structure." 802 F.2d at 899. The United rebid was invalidated on appeal not because the "bid positions were not filled until pilots were

As a result, ALPA could not possibly have assumed that it would successfully invalidate the 85-5 bid results under the RLA if the pilots had unconditionally abandoned the strike.²²

3. *The Seniority Recall Issue*: There was in 1985, and is now, the substantial possibility that, absent a contractual obligation to recall strikers in seniority order, Continental could have disregarded seniority considerations entirely in determining as among returning strikers which employees were to be reinstated, and in what positions.

There was no RLA case law at the time on the question of the validity of such a policy. And the NLRA case law as of 1985, even assuming its relevance, indicated that, absent an obligation to recall strikers in seniority order grounded in the parties' collective bargaining agreement or relevant past practice, the employer need not recall in seniority order, and may use any rational system for recalling strikers that does not

trained and serving in these positions" at the end of the strike, as the court below supposed, J.A. 92, but only because the evidence showed that the rebid was actually motivated by an "intent to destroy the union" rather than any business need. 802 F.2d at 899-900.

²² *IFFA v. TWA*, 819 F.2d 839 (8th Cir.), cert. denied as to the pertinent question, 485 U.S. 958 (1988), is entirely inapposite to a determination whether the bid positions were filled in the present context. The pertinent holding of that case—that trainees did not become permanent replacements until they had actually performed services—was based on the statutory definition of who is an "employee" for purposes of RLA coverage. 819 F.2d at 845; 45 U.S. § 181; see *ALPA v. United Air Lines*, supra, 802 F.2d at 911 (holding, in a separate part of the opinion from that concerning the rebid, that pilots who never actually performed services for the employer were not employees under the RLA, and were not protected by its provisions). Here, there is no doubt that both the individuals awarded jobs in the bid and the returning strikers were employees, covered by the statutory protection; the problem was to determine, as between such statutory employees, who was entitled to certain positions.

discriminate on the basis of degree of union activity. *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 105 (1969), quoting *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938); see also *NLRB v. Wells Fargo Armored Service Corp.*, 597 F.2d 7, 11 (1979); *Indiana Desk Co.*, 276 NLRB 1429 [No. 165] (1985); cf. *Bio-Science Laboratories*, 209 NLRB 796 (1974).²³

ALPA was thus faced with substantial legal uncertainty over whether the RLA would require Continental to recall strikers to available pilot positions in seniority order and rationally sought such protection in the order and award.²⁴

4. *Conclusion*—In sum, it simply is not true, as the court of appeals assumed, that the law, as it existed in 1985, granted the striking pilots clear and indisputable rights to the 85-5 bid jobs had the strikers unconditionally offered to return to work. It would have been irresponsible for ALPA to have assumed the contrary. Thus, ALPA acted soundly—and in all events rationally—in deciding to seek a settlement and in settling on the terms the Union then negotiated. A judge or jury could conclude otherwise only by holding the Union to a standard

²³ Post-1985 cases confirm that, had ALPA had to litigate this question, Continental would have had substantial arguments for a striker recall system that disregarded seniority altogether, in favor, for example, of merit, age, alphabetical order, or former position, in distributing available vacancies. See *Lone Star Industries*, 279 NLRB 550, 551 (1986), on remand, 298 NLRB No. 160; *NLRB v. American Olean Tile*, 826 F.2d 1496, 1501 (6th Cir. 1987).

²⁴ Similarly, Continental might well have continued its confrontational approach and refused to reinstate strikers who "had 'obtained regular and substantially equivalent employment,' . . . [where] the company could show that [the strikers] could not be reinstated because of 'legitimate and substantial business reasons,' . . . or [who had] engaged in sufficient misconduct 'to remove [them] from the protection of the [National Labor Relations] Act. . . ." *OCAW v. American Petrofina Co.*, 820 F.2d 747, 750 (5th Cir. 1987) (citations omitted). The order and award also resolved this legal uncertainty in the strikers' favor.

of perfect foresight or by taking over the Union's responsibility of weighing the risks and potential benefits of not settling. Such judicial involvement in collective bargaining negotiations would strike at the heart of the national labor policy.

CONCLUSION

For the above stated reasons, the decision below should be reversed and remanded with instructions to reinstate summary judgment for the petitioner.

Respectfully submitted,

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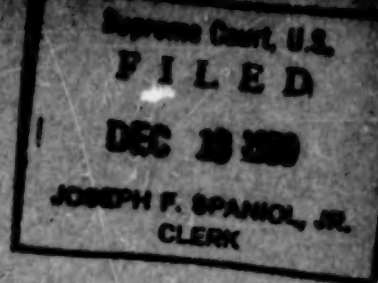
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No. 89-1493

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
Petitioner,

v.

JOSEPH E. O'NEILL, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF FOR THE RESPONDENTS

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COUNTERSTATEMENT OF QUESTION PRESENTED

This duty of fair representation case involves an international union's settlement of a strike on terms that even the district court acknowledged were atrocious. The record contains substantial evidence that, *inter alia*, the union did not consult or obtain approval from its striking members, though committed to do so, conceded super-seniority to strikebreakers, and disenfranchised the strikers from voting in the succeeding union election, thus perpetuating the settling officials in office.

In these circumstances, did the court of appeals correctly conclude that the matter could not be concluded on summary judgment, but warranted trial?

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OPINIONS BELOW

The issue in this case is whether, on summary judgment, the district court correctly held that ALPA could settle a strike against Continental Airlines, Inc. by abandoning its striking pilots in favor of Continental's strikebreakers. This is an intensely factual matter, but the district court gave no written explanation for its rulings either originally or on court-invited motion for reconsideration; it did, however, acknowledge that the strike settlement was "atrocious in retrospect." The district court entered summary judgment for ALPA because the strike settlement was entered as a bankruptcy court order and award, and because the district court believed the union's conduct could not be translated into personal animosity or illegal motives against its member pilots (JA 73-76).¹

The United States Court of Appeals for the Fifth Circuit reversed the district court's grant of summary judgment on the duty of fair representation claim in an opinion reported at 886 F.2d 1438 (5th Cir. 1989). The Fifth Circuit denied petitions for rehearing and rehearing en banc in an unreported order.

JURISDICTION

This Court's jurisdiction to review the judgment of the court of appeals by writ of certiorari is founded on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves a union's duty of fair representation under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA").

¹ "JA" references are to the Joint Appendix; "R" references are to the district court docket sheet.

STATEMENT OF THE CASE

A. The Beginning of the Strike and How Strike Decisions Were Supposed to Be Made.

ALPA was the authorized collective bargaining representative under the RLA for pilots employed at Continental Airlines, Inc. ("Continental"), and for approximately forty years prior to these events had collective bargaining agreements with Continental. On September 24, 1983, Continental filed for protection under Chapter 11 of the Bankruptcy Code, rejected its collective bargaining agreement with ALPA, and instituted "emergency work rules" that cut pilot wages and benefits by more than half (R 131, p. 2; R 149, Ex. 102). ALPA, upon a vote by the Continental Airlines Master Executive Council ("MEC"),² responded by calling a pilot strike effective October 1, 1983. The members of the plaintiff class dutifully withheld their services under ALPA's direction until the strike ended two years later, on October 31, 1985.

ALPA representatives met periodically with Continental throughout the strike to negotiate a collective bargaining agreement and a strike settlement. ALPA's negotiations were to be carried out through the MEC and in accordance with ALPA's Constitution and Bylaws and the MEC's Policy Manual. Specifically, the Policy Manual called for appointment of a pilot Negotiating Committee expressly charged with keeping the MEC fully informed about the negotiations. It also required approval by the elected MEC representatives of any agreement reached

² The MEC consisted of nine Continental pilots elected by the general membership. The MEC was ALPA's local governing body for the Continental pilots and, unless otherwise noted, references to ALPA in this brief include the MEC. Each of ALPA's represented airlines has its own Master Executive Council.

with Continental (R 149, Ex. 49, Chap. 17).³ The ALPA Constitution further required any agreement to be submitted to ALPA's national organization and signed by ALPA's national president, Hank Duffy.

Additionally, and as contemplated by ALPA's Constitution, the MEC passed a resolution near the beginning of the strike requiring the pilots to ratify any agreement granting concessions to Continental (R 132, p. 17; R 163, Att. 5.1, pp. 507-513). There was undisputed evidence below that ALPA also promised the pilots throughout the strike that they would have the opportunity to ratify any agreement with Continental, not just one granting concessions (R 149, Exs. 47, 56, ¶ 8, Exs. 94, 95, 96; R 163, Att. 5.1, p. 569).

B. ALPA's Misrepresentations During the Strike.

For more than a year prior to the strike settlement, ALPA misrepresented what it was doing to protect the striking pilots. For example, ALPA promised pilots whom Continental had coerced into premature retirement or resignation that they would be included within the strike settlement⁴ (R 149, Exs. 42, 43, 91). The majority of the more than 300 strikers who submitted "retirement" or "resignation" letters to access their retirement funds did so in reliance upon ALPA's assurances. By at least May 8, 1985, ALPA had decided to exclude the retired and

³ These reporting and approval requirements were made part of the Policy Manual in the early 1980's in response to actions by a rogue negotiating committee that reached an agreement without reporting to the MEC (R 149, Exs. 57, 58).

⁴ Throughout the strike Continental coerced striking pilots to retire or resign by, among other things, withholding distribution of their retirement funds. The applicable retirement plan required Continental to distribute these funds in mid-1983 when it ceased making contributions to it, but Continental held the funds hostage and required financially distressed strikers to submit retirement or resignation letters as a condition of receipt. *In re Continental Airlines Corp.*, Consolidated Case No. 83-04019-H2-5, unpublished order dated December 12, 1988, pp. 3-4.

resigned pilots from any settlement (R 163, Att. 5.2, p. 674; Att. 7.22, p. Z15672). It never disclosed this decision to the pilots and many of them unwittingly retired or resigned during the strike's final months in the reasonable expectation that ALPA would protect them (R 149, Exs. 43, 47).⁵ The final strike settlement expressly excluded the retired and resigned pilots from returning to work (JA 10).

ALPA also represented to the striking pilots that it would not accept any agreement with Continental that did not preserve their seniority. ALPA promised the pilots who remained loyal and stayed out on strike that it would take Continental "all the way to the Supreme Court" (R 168, Ex. B, p. 8)⁶ if necessary to protect their rights. ALPA broke this promise and, as a result, the final strike settlement substantially favored the non-striking pilots in terms of seniority.

C. Continental's "Withdrawal" of Recognition and the 85-5 Bid.

Continental and ALPA negotiated off and on until August 26, 1985, when Continental announced it was withdrawing recognition of ALPA as the pilots' statutory bargaining representative (JA 80). Until the present litigation, ALPA maintained that Continental's withdrawal

⁵ For example, in September 1985, at least four months after deciding to exclude the retired and resigned pilots, ALPA president Duffy wrote the following to a pilot who had inquired whether ALPA was still representing retired and resigned pilots in negotiations: "When it comes time to sit down to negotiate a back to work agreement, it is the MEC's full intention to represent all [Continental] pilots" (R 149, Ex. 91.1).

⁶ Ironically, ALPA's promise to go to the Supreme Court is one of the very few promises it kept.

was without legal effect, and in fact Continental continued to bargain with ALPA.⁷

On September 9, 1985, Continental posted Supplementary Base Vacancy Bid 1985-5 ("the 85-5 bid"), which announced pilot positions, or "vacancies," Continental projected for 1986 (JA 80).⁸ The 85-5 bid included over 400 pilot positions and was the largest bid in Continental's history. Realizing that the bid could effectively lock striking pilots out of positions, particularly captaincies, for many years, the MEC authorized striking pilots to make offers to return to work and to submit bids. Continental initially accepted the strikers' 85-5 bids, but later announced it would not honor them. Continental "awarded" the 85-5 bids sometime in October 1985 meaning that it matched the name of each bidding nonstriking pilot to a projected vacancy according to Continental's seniority bidding system. As of the end of the strike, however, the positions had not actually been filled and there was no evidence that Continental had even scheduled any pilots for training for these future positions (R 163, Att. 5.2, pp. 627, 895).

⁷ In its motion for summary judgment in the district court, ALPA asserted it did not owe a duty of fair representation to these pilots because Continental did not recognize it as the pilots' statutory bargaining representative (R 131, pp. 27-31). ALPA argued that it was simply the common law agent for the striking pilots (*id.*). Thus, ALPA made no effort in its summary judgment motion to show that it fulfilled its duty to the pilots.

⁸ Continental identifies pilot jobs (or "seats") by a combination of status (captain, first officer, second officer), equipment (type of plane), and base (city out of which they fly) (JA 80). For example, a pilot might be a captain on a 737 flying out of Houston. Continental periodically posts job vacancies and permits pilots to "bid" for them according to seniority, as measured by initial date of hire (*id.*). This seniority bidding system is used throughout the airline industry, and Continental used it before and during the strike (JA 91, n.3).

D. The Events of September 1985.

On September 19 and 20, 1985, top ALPA officials and the Continental MEC officers (but not the pilots' elected MEC representatives) met secretly at ALPA headquarters in Washington, D.C. (R 149, Ex. 67).⁹ Testimony in the record reveals that ALPA decided at this meeting to end the strike and to cut off its financial support to the striking pilots (R 149, Exs. 67, 69). The MEC officers, under the direction of ALPA counsel Bruce Simon, were dispatched to end the strike.

On September 21, 1985, the MEC convened its monthly meeting in Washington, D.C. without any knowledge that ALPA had wrested away the MEC's decisionmaking authority and had decided to end the strike.¹⁰ While the MEC was meeting to discuss how to proceed with the strike (R 149, Ex. 67), ALPA president Duffy was across town informing non-Continental pilots that the strike was ending and a premature press release was issued announcing that the MEC had so decided (R 149, Ex. 68; Ex. 78).

Contrary to ALPA's plans, the MEC did not end the strike at its September meeting (R 149, Ex. 3.1). Instead the MEC resolved to convene one more round of negotiations for the sole purpose of seeking a return to work with seniority (R 149, Ex. 3.1, pp. Z002983-Z002984). Toward that end, the MEC passed a resolution known as Resolution 3, which provided:

⁹ The MEC representatives are elected by the pilots, and the MEC officers are then appointed by the MEC representatives. The MEC officers at this time were Dennis Higgins, chairman, Peter Lappin, vice-chairman, and Donald Henderson, secretary-treasurer (R 149, Ex. 3.1).

¹⁰ Notes passed discretely between MEC chairman Higgins and vice chairman Lappin at this meeting confirm their marching orders from ALPA to end the strike. Lappin asked Higgins, "Is the MEC supposed to pull the strike down?," and received the written response "yes..." (R 149, Ex. 46).

Be it resolved the equitable solution and settlement of outstanding issues be pursued under the direction of the MEC officers and Negotiating Committee Chairman.

(*Id.*, p. Z002985).

During the present litigation, ALPA has construed Resolution 3 to mean that the MEC officers and the negotiating committee chairman had actual authority to reach a settlement agreement without obtaining either MEC approval or pilot ratification, as otherwise required (R 132, 153).¹¹ MEC representative John Prater, who seconded Resolution 3, however, testified by affidavit that Resolution 3 meant the pilot negotiators were to *pursue* a resolution but had no authority to reach a final agreement except through normal approval procedures (R 149, Ex. 67). Another MEC member, Harry Parker, had a similar understanding of Resolution 3 (R 149, Ex. 48).

In response to a question posed to him at the meeting, MEC Chairman Higgins, one of the officers in attendance at the secret September 19-20 ALPA meeting, reiterated the understanding that negotiators were only to pursue a settlement, and his comments were memorialized in notes of the meeting kept by the MEC Vice Chairman Lappin (R 163, Att. 7.23, p. Z012255). Higgins' comments are excluded from the official minutes of the meeting, which ALPA did not prepare until *after* the present litigation commenced (R 149, Ex. 3.1, p. Z002979; Ex. 81, pp. 381-84).¹²

E. The Events of October 1985.

In early October 1985, MEC officers Higgins, Lappin, and Henderson and Negotiating Committee chairman

¹¹ This would be contrary to the MEC Policy Manual, which required notice to the pilots and a special vote to alter its provisions (R 149, Ex. 49, Chap. 1).

¹² Other than the omission of Higgins' comments, the minutes track Lappin's notes precisely (R 149, Ex. 3.1).

Kirby Schnell (collectively the "pilot negotiators"), and ALPA counsel Bruce Simon acting, in his words, as president Duffy's delegate, renewed settlement negotiations with Continental (R 163, Att. 5.6, p. 131). ALPA enlisted Bankruptcy Judge Roberts, who presided over the Continental bankruptcy, to participate in the negotiations. From that point forward ALPA refused to share details of the negotiations with the pilots or their elected MEC representatives (R 149, Ex. 66, pp. 2-3, Ex. 48, p. 3; R 163, Att. 5.2, pp. 646-47). To explain their silence, Simon told the pilot negotiators, who then told the MEC, that Judge Roberts had issued a "gag order" on the negotiations that precluded them from sharing information (R 149, Ex. 48, ¶ 6, Ex. 66, pp. 2-3). When deposed, Continental negotiators admitted they never heard of such a gag order (R 149, Ex. 10, pp. 67-69; R 163, Att. 5.6, pp. 84-85). While the gag order supposedly was in place, Continental was openly sharing negotiating proposals with its advisory group of nonstriking pilots (R 149, Ex. 10, pp. 67-68; R 163, Att. 5.6, p. 82). Meanwhile, Simon himself kept Duffy personally apprised of the negotiations (R 163, Att. 4).

Undisputed record evidence demonstrates that by this point in time, ALPA (1) knew that Continental had previously returned striking machinists and flight attendants to work with their seniority intact when their unions made unconditional offers to return to work (JA 91, n.3; R 163, Att. 5.5, pp. 60-61, 166); (2) had received legal advice from its own lawyers that Continental would be required to fill *all* vacancies with returning strikers, just as United Airlines had been required to do in litigation ALPA successfully concluded less than two months earlier (R 163, Att. 5.1, pp. 213-17, Att. 5.5, p. 165);¹³ and (3) had been informed by Continental that it would

¹³ALPA v. United Air Lines, Inc., 614 F. Supp. 1020 (N.D. Ill. 1985), *aff'd in part*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987).

reinstate strikers with full seniority if ALPA made an unconditional offer to return to work (JA 91, n.3; R 163, Att. 1, Att. 5.5, pp. 165-70).

There is no evidence in the record, either by way of documents or deposition testimony, that ALPA was uncertain about the law governing the rights of returning strikers. The only advice given was that Continental would be required to adhere to the district court results it obtained in the United Airlines litigation. There also is no evidence in the record that ALPA's agreement to the strike settlement was motivated by concerns about the law. Indeed, in November 1985, when ALPA explained the settlement to its members, it never once mentioned that it conceded seniority because it was uncertain about the legal rights of the striking pilots (R 149, Exs. 71, 73).

The record suggests that ALPA wanted to settle the strike on a negotiated basis, even if that settlement was worse than an unconditional offer to return to work. Therefore, ALPA never communicated to the MEC Continental's offer to honor the striking pilots' seniority if they would unconditionally return, and it never seriously considered that proposal.

Not only did ALPA want a negotiated settlement, it devised one for which it would not have to accept responsibility. Thus, by late October 1985, ALPA conceived a way for the strike settlement to be "imposed" so that president Duffy would not take blame for it. On October 18, 1985, Duffy sent a mailgram to the ALPA Board of Directors saying that he planned to obtain a court-ordered settlement (R 163, Att. 7.3). ALPA counsel Simon's notes of October 25 reflect his *ex parte* conversation with Judge Roberts in which Simon urged Roberts to be "creative" and to consider imposing the settlement as a court order (R 163, Att. 4). On October 29, Simon made the same request to the Continental negotiators, who understood that a court order was necessary for the set-

tlement to occur (R 149, Ex. 9, pp. 177-179, Ex. 10, p. 115).¹⁴ Simon's position contravened the ALPA Constitution and Bylaws, which expressly require the ALPA president's signature on all agreements (R 149, Ex. 8, p. 58).

Once it knew that Judge Roberts and Continental would agree to entry of the strike settlement as a bankruptcy court "order and award," ALPA conceded almost all outstanding issues and rushed the matter to conclusion (*compare* R 149, Exs. 7.1 and 7.2 to JA 7-41). It submitted the settlement to Judge Roberts on October 31, 1985 and he signed it the same day.

The concessions ALPA made in the settlement were extreme. As MEC negotiating committee chairman Schnell's contemporaneous notes state, the settlement agreement "bastardized [seniority] beyond all recognition,"

¹⁴The pilots were scheduled to depose Simon on Dec. 2, 1987, after successfully fighting ALPA's assertions of privilege and trying to schedule the deposition for over 11 months, but the summary judgment bench ruling on Nov. 30, 1987 denied them that opportunity. Although the pilots began to depose ALPA attorney Savelson, that deposition was incomplete when the district court ruled.

and "f—ked my people forever" (R 149, Ex. 1).¹⁵ Schnell explained these comments later in his deposition when he said the union negotiators had "gone beyond what was reasonable" (R 163, Att. 5.1, p. 1099).

F. ALPA's Denials and Misrepresentations Concerning the Strike Settlement.

From the moment the bankruptcy court entered the secret strike settlement as an order, ALPA denied any responsibility for its terms. It told the striking pilots that the bankruptcy court "imposed" the settlement and denied that it had agreed to any of the settlement's major provisions (R 149, Exs. 14, 15). It also misrepresented that the settlement had any effect whatsoever on seniority (*id.*). ALPA similarly misrepresented the settlement to its members at other airlines (R 149, Ex. 16).

When the striking pilots instituted the present litigation, ALPA did not attempt to justify or rationalize the settlement in any way. Instead, it maintained that it owed the pilots no duty of fair representation because Continental had ceased recognizing it as the pilots' exclusive bargaining representative in August 1985 (R 131,

¹⁵The suggestion in ALPA's brief that the bankruptcy court's approval somehow sanitizes what ALPA did deserves short shrift. First, as the Fifth Circuit noted, the bankruptcy court had virtually no function in reviewing or agreeing to the order and award. It merely issued the agreement that ALPA and Continental submitted to it (R 163, Att. 12.2). Second, the bankruptcy court's determination deserves no deference because, as the Fifth Circuit found in a related case, the bankruptcy judge was compromised and should have recused himself. Specifically, the bankruptcy judge accepted employment with the law firm representing Continental shortly after making a number of dispositive rulings, including a ruling granting substantial counsel fees to his prospective firm. *In re Continental Airlines Corp.*, 901 F.2d 1259, 1261-63 (5th Cir. 1990). Third, when the O'Neill Group objected to the order and award, Continental responded that the pilots should file a separate fair representation claim (R 163, Att. 2.2, p. 4) and eventually the bankruptcy court ruled that it would not reach any RLA issues but would leave them for this action (R 163, Att. 2.4, p. 18).

pp. 27-31). ALPA's *post hoc* justifications for the settlement, both in terms of it being the best bargain the union could get for its members and in terms of the alleged legal uncertainty surrounding the strikers' rights to fill vacancies, were developed at the appellate level.

G. The Secret Strike Settlement and Its Effects.

To understand the impact of the settlement agreement on the striking pilots and why ALPA wanted to hide its role in reaching the settlement, it is necessary to understand how the settlement agreement operated.

Before and during the strike Continental maintained a seniority-based bidding system. Under this system, only the most senior, most experienced pilots advance to captain, the position of ultimate responsibility in an aircraft (R 163, Att. 9, pp. 7-8). The strike settlement provided only limited opportunities for strikers to return to work at Continental and, for those who did, turned seniority on its head.

The settlement required striking pilots to choose among three options. Pilots who wanted to return to work were required to choose Option 1 or Option 3 (JA 81). Option 1 required pilots to execute a waiver of all claims against Continental. These pilots were called back to work in seniority order, but their right to bid for captain seats was lost because the settlement allowed Continental to "assign" them to their initial post-strike captain seat (JA 10-12). Continental exercised this right by assigning the returning strikers to the least desirable captain seats available, i.e., smaller aircraft that paid the

lowest salaries based in faraway cities.¹⁶ Option 3 permitted pilots to keep claims against Continental, but provided that they could neither return to work nor become captains until after the Option 1 pilots (JA 11). Further, Option 3 pilots returned to work based upon the order in which Continental received their Option 3 selection papers, rather than by seniority (*id.*).

The settlement agreement reserved the first 100 captain vacancies in the 85-5 bid for nonstriking pilots who otherwise had insufficient seniority for these positions under Continental's normal bidding procedures (JA 82).¹⁷ Continental then assigned the 70 most senior Option 1 pilots to the next 70 captain seats in the 85-5 bid (*id.*). After these first 170 captains vacancies were filled, the settlement provided for a 1:1 allocation between striking pilots and nonstriking pilots for *all* future captain seats, regardless of seniority (JA 13).

The settlement also provided a severance option, Option 2, for pilots who elected not to return to work (JA 83). Option 2 required the pilots to resign and waive almost all claims against Continental in exchange for

¹⁶In its amicus brief, Continental argues that it wanted to control these assignments in case the returning strikers sought to interfere with normal flight operations. Brief p. 27. Continental's argument is both irrelevant and *post hoc*. Nothing in the record suggests that the pilots had even thought about such post-strike conduct, or that Continental actually separated them on their return. Virtually all of the alleged "facts" in Continental's brief are unsupported in this record and will be heavily disputed if this matter goes to trial.

¹⁷The settlement also allowed the nonstrikers to move into the first officer positions available in the 85-5 bid. This left only the second officer positions in the 85-5 bid and the second officer positions that would become vacant as nonstrikers advanced to first officer for returning strikers, regardless of their seniority or the positions they held at Continental before the strike. Second officer is an entry level pilot position.

severance pay (*id.*).¹⁸ Pilots who had taken temporary employment at other airlines were excluded from Option 2 (JA 22). The evidence shows that ALPA and Continental negotiated Options 1 and 3 so as to make Option 2 the most attractive of the available alternatives and thereby reduce the number of strikers returning to work (R 163, Att. 2.1, p. 48, Att. 3.1, pp. 132-34, Att. 5.2, pp. 1247-48).

The sacrifice of the seniority system was only the most conspicuous of the strike settlement's terms. ALPA also agreed to withhold all representational services and strike benefits from any pilots choosing Option 3, to move the pilots hired during the strike (the "permanent replacements") ahead of many of the returning strikers on the seniority list, to dismiss litigation filed on behalf of pilots without first obtaining their consent, and to allow Continental to harass returning strikers through "psychological testing" of their fitness for reemployment. As previously mentioned, the settlement also excluded all retired and resigned pilots (JA 10-11, 22).

The effects of the secret strike settlement are long-lasting. Because a nonstriker who obtained a captain position under the settlement cannot be displaced in later bids by even the most senior pilot, nonstriking pilots will be able to maintain their allocated captain vacancies as long as they wish. Striking pilots, on the other hand, had their seniority rights severely curtailed.

H. The Disenfranchisement of the Striking Pilots.

Immediately after the bankruptcy court entered the secret strike settlement as an order and award, ALPA put the Continental MEC into custodianship and placed

¹⁸The only claims Option 2 preserved were claims for the few days' wages and benefits that were earned prior to Continental's bankruptcy that were not yet paid (JA 26). These claims were minuscule compared to the pilots' other claims for, among other things, contract rejection damages and furlough pay.

the Continental pilots on inactive status so that they could not vote in union elections (R 149, Ex. 70). ALPA explained this custodianship on the grounds that Continental was in bankruptcy (*id.*, p. GG000195).¹⁹ By that time, however, Continental had been in bankruptcy for over two years. Moreover, pilots for Frontier Airlines, who shortly thereafter were merged into Continental and whose employment circumstances were thus identical to the Continental pilots, were *not* put on inactive status and were allowed to vote (*id.*). The disenfranchisement of the striking pilots of Continental provided president Duffy's margin of victory at the next union general election (R 149, Ex. 70).

SUMMARY OF ARGUMENT

ALPA exceeded its authority and settled a strike without member knowledge or required approval; agreed to a settlement that was worse than an unconditional offer to return to work and that discriminated between strikers and nonstrikers; misrepresented to its members the settlement terms and its responsibility for them; and disenfranchised its own strikers so that they could not vote in the next union general election, thus perpetuating the settling officials in office. Under these circumstances, the Fifth Circuit properly found that the union was not entitled to summary judgment on the striking pilots' duty of fair representation claim.

ALPA's conduct must be measured against the standard for the duty of fair representation set forth in *Vaca*

¹⁹Upon placing the MEC into custodianship and the pilots on inactive status, Duffy appointed the four pilot negotiators as the Continental custodians and "Contract Transition Consultant[s]" with monthly salaries of \$4,250.00 (R 149, Ex. 21). There was affidavit testimony below that Duffy previously had told the MEC members, including these four negotiators, that he would take care of the people who cooperated with him (R 149, Ex. 67, ¶ 13). The Continental pilots remain in custodianship more than five years later despite provisions of the Labor-Management Reporting and Disclosure Act making custodianship longer than 18 months presumptively unlawful.

v. Sipes, 386 U.S. 171 (1967). Under the *Vaca* standard, the union violates its duty of fair representation if its conduct is "arbitrary, discriminatory, or in bad faith." *Id.* at 190. This Court has never retreated from the *Vaca* standard, and has cited it in a number of duty of fair representation decisions, including two cases decided just last term. *Chauffeurs Local No. 391 v. Terry*, 110 S. Ct. 1739 (1990); *United Steelworkers of America v. Rawson*, 110 S. Ct. 1904 (1990).

A fair representation standard that allows judicial review for rationality is the same standard applied to other agents, and has the salutary effect of deterring union misconduct that a standard requiring actual proof of subjective hostility does not. ALPA's argument that the *Vaca* standard results in excessive judicial oversight has not been borne out by experience. In fact, the lower courts are very careful in adjudicating union misconduct and, in the over one thousand reported decisions relying upon *Vaca*, have usually found in the unions' favor unless, as here, there is true abandonment of a union's responsibilities.

ALPA's attempt to justify its conduct on the grounds that the law concerning strikers was uncertain in 1985 is without merit. There is no evidence in the record that ALPA was, in fact, legally uncertain when it settled the strike or that its agreement was motivated by this alleged "uncertainty." This is merely the *post hoc* rationalization of counsel developed at the appellate level.

The actual evidence is that ALPA was advised and believed that the returning strikers were entitled to fill all vacancies with their seniority intact. In addition, Continental told ALPA that it would accept the returning strikers back with full seniority if the union made an unconditional offer to return to work. ALPA never communicated this offer to the striking pilots or their elected representatives.

Independent of any legal uncertainty, there is additional misconduct here upon which a jury could find that ALPA breached its duty of fair representation. ALPA exceeded its authority in agreeing to a settlement without first getting member approval; it circumvented union policies designed to prevent rogue union action; it misrepresented to an entire group of striking pilots that it would include them in the settlement and it did not; it maneuvered to have the settlement entered as a bankruptcy court order so that it would not have to take responsibility for it and then denied its participation in arriving at the settlement; and, after the settlement was reached, it disenfranchised the striking pilots by placing them on inactive status so that they could not vote in the next union general election. That disenfranchisement provided the margin of victory for the union president when the election occurred. Given all of these facts, a jury is entitled to conclude that the settlement was arbitrary and irrational.

Finally, ALPA breached its duty of fair representation by agreeing to a settlement that illegally discriminated against strikers by conferring "superseniority" preferences on nonstrikers after the strike. The result of the superseniority preference was that, two years after the strike, a nonstriking pilot received a job preference over a striking pilot who had 19 years greater seniority. In the contemporaneous notes of the chairman of the MEC negotiating committee, the settlement agreement "bastardized the seniority system forever." Such arrangements have been illegal, and properly so, ever since this Court's decision in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

ARGUMENT

I. ALPA's Conduct In Secretly Settling The Strike Must Be Measured Against The Duty Of Fair Representation Standard Set Forth In *Vaca v. Sipes*.

The duty of fair representation is the essential protection for employees who, like these pilots, have been abandoned by their union. In this Court's jurisprudence, the duty of fair representation is the quid pro quo for the individual employee's surrender of his bargaining rights. *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (1944). The duty stands as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca v. Sipes*, 386 U.S. at 182. Unlike the unfair labor practice provisions of the Railway Labor Act, which are targeted at the public interest underlying federal labor policy, the duty of fair representation targets the wrong done the individual employee and compensates him for the damage inflicted. *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979). The standard for the duty of fair representation must therefore be calculated to allow the trier of fact to hold accountable a rogue union that has run roughshod over its members, as ALPA did here.²⁰

We agree with the Solicitor General that a union violates its duty of fair representation *whenever* it acts arbitrarily, discriminatorily, or in bad faith. See *Vaca v.*

²⁰Although the RLA does not expressly include a duty of fair representation, Congress has indicated its approval by incorporating a parallel duty in Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. § 7101, *et seq.* See *Karahalios v. Nat'l Federation of Federal Employees*, 109 S. Ct. 1282, 1285-86 (1989). Congress' approval of the standard articulated in *Vaca v. Sipes* is also implicit in the lack of any contrary congressional action in the 23 years since *Vaca* was decided. See *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 182 (1981) (lack of congressional action construed as implicit approval of long-standing Board policy).

Sipes. This standard applies whether the union is negotiating contracts, *Ford Motor Co. v. Huffman*, 345 U.S. 330, 333 (1953), administering them, *Vaca v. Sipes*, 386 U.S. at 190-91, or doing the myriad other things that are not easily categorized, but that fall within the union's representative functions. See, e.g., *Breining v. Sheet Metal Workers International*, 110 S. Ct. 424, 429 (1989). ALPA's attempts to narrow the duty of fair representation to instances of subjective hostility or other improper motive not only conflict with this Court's precedents and a significant body of appellate case law, but also would immunize unions from the meaningful judicial review necessary to ensure that they do not abuse the trust placed in them.

A. This Court Has Adopted *Vaca v. Sipes* As the Standard Governing the Duty of Fair Representation.

ALPA asks this Court to abandon the standard for the duty of fair representation in *Vaca v. Sipes*, 386 U.S. 171 (1967), which this Court and the lower federal courts have followed in over one thousand subsequent decisions.²¹ In *Vaca v. Sipes*, this Court addressed a union's refusal to arbitrate an employee's grievance. An employee who had been discharged for physical disability had his doctor certify that he could return to work. The employer's doctor disagreed. The union carried the grievance through the preliminary steps, but ultimately concluded with the employer that arbitration would be futile. At trial, plaintiff proved that in fact he had been capable of working. The jury found for the plaintiff and against the union and the Missouri Supreme Court affirmed.

In reversing, this Court described the duty of fair representation as "a statutory obligation to serve the

²¹As of 1985 there were 1,225 reported decisions relying on *Vaca*. See B. Aaron, "An Overview of Fair Representation," in *The Changing Law of Fair Representation* (Cornell University Press 1985) (J. McKelvey, ed.), p. 16.

interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* at 177, citing *Humphrey v. Moore*, 375 U.S. 335 (1964). In so holding, this Court rejected the union's argument that judicial scrutiny of union conduct or the bases of union decisions is inappropriate, or that such review should be left to a specialized tribunal like the National Labor Relations Board:

[F]air representation duty suits often require review of the substantive positions taken and policies pursued by a union in its negotiation of a collective bargaining agreement and in its handling of the grievance machinery; as these matters are not normally within the Board's unfair labor practice jurisdiction, it can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts, which have been engaged in this type of review since the *Steele* decision.

386 U.S. at 181.

This Court has invoked the *Vaca* standard in a variety of factual situations.²² In *Czosek v. O'Mara*, 397 U.S. 25 (1970), the Court reinstated a lawsuit by merged employees against their union for arbitrarily and capriciously refusing to process plaintiffs' claims. The Court held that the employees had stated a cause of action for breach of the duty of fair representation. *Id.* at 27. In *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979), a lawsuit involving the union's failure to properly process a grievance, the Court reaffirmed *Vaca* in stating that the fundamental purpose of unfair representation suits is to compensate for injuries caused by violations of employee's rights. *Id.* at 48. And, in *Breining v. Sheet Metal Workers International*, 110 S. Ct. 424 (1989), this Court refused to create an exception to *Vaca* for the operation of union hiring halls, albeit in the preemption context.

Just last term this Court issued two duty of fair representation opinions; both relied on the standard set forth in *Vaca* and affirmed its application beyond the grievance context. In *Chauffeurs Local No. 391 v. Terry*, 110 S. Ct. 1339 (1990), a case involving the Seventh Amend-

²²ALPA overreaches when it suggests at pp. 22-25 of its brief that this Court's decision in *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971), narrows the standard for the duty of fair representation set forth in *Vaca*. The cited *Lockridge* passage is dictum and the Court has never cited *Lockridge* as the proper standard of conduct in any duty of fair representation case. Instead, the standard cited by this Court in every reported decision since *Lockridge* is the "arbitrary, discriminatory, or in bad faith" standard of *Vaca*. ALPA also construes *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), too narrowly. There the Court affirmed the district court decision that the negotiation of the seniority system at issue was not "arbitrary, discriminatory or in anyway unlawful." 345 U.S. at 333. The Court held that a union is empowered to make concessions "in the light of all relevant considerations." *Id.* at 338. This is the same "arbitrary standard" articulated later in *Vaca*, 386 U.S. at 177, and followed by the Fifth Circuit in *Tedford v. Peabody Coal Co.*, 533 F.2d 952, 957 (5th Cir. 1976), and in the decision below.

ment right to jury trial, the Court quoted *Vaca* and analogized the duty of fair representation to the fiduciary duties owed by trustees. The Court categorically stated:

The duty [of fair representation] requires a union "to serve the interests of all members [in a bargaining unit] without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." ... A union must discharge its duty both in bargaining with the employer and in its enforcement of the resulting collective bargaining agreement.

Id. at 1344. And, in *United Steelworkers of America v. Rawson*, 110 S. Ct. 1904 (1990), a case involving federal preemption of state law, the Court reiterated that while a union's performance of a mine inspection could be measured against the *Vaca* standard, it could not be measured against state law negligence principles.

B. The *Vaca* Standard Is a Fair One.

Vaca's standard for the duty of fair representation is not a harsh one. It affords unions a "wide range of reasonableness" in their conduct. See *United Steelworkers*, 110 S. Ct. at 1912, citing *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).²³

The duty of fair representation parallels the duty a trustee owes trust beneficiaries, a common law analogy this Court applied to unions last term in *Chauffeurs Local No. 391 v. Terry*, 110 S. Ct. 1339, 1346 (1990). See Restatement (Second) of Trusts §§ 170-185 (1954). The *Vaca*

²³While *Vaca* itself does not define "arbitrary," this is a common term with a commonly understood meaning. Black's Law Dictionary defines arbitrary as: "fixed or done capriciously or at pleasure. Without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic." *Black's Law Dictionary*, p. 104 (6th ed. 1990).

standard also resembles the duties that agents owe their principals.²⁴ See Restatement (Second) of Agency §§ 378-398 (1958). Nor would the union here be treated differently than corporate officers and directors under the business judgment rule if the *Vaca* standard were applied. See *Hanson Trust PLC v. ML SCM Acquisition Inc.*, 781 F.2d 264, 275 (2d Cir. 1989) (judicial review of business judgment requires review of the content of the judgment and the information on which it is based); *Cramer v. General Telephone & Electronics Corp.*, 582 F.2d 259, 275 (3d Cir. 1978) (court must review reasonableness of corporate director's judgment where it appears so unreasonable as to be outside the bounds of discretion). Even legislatures, the analogy used in *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (1944), undergo judicial review of the rationality of their actions. *E.g.*, *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432 (1985). We see no reason why a union should be entitled to escape review of the rationality of its acts when a trustee, an agent, a corporate officer or director, or a legislature cannot.

More important, the standard of fair representation that ALPA proposes, which would require proof of subjective hostility, cannot enforce the union's affirmative responsibilities. It would enable a union to escape liability if it treats all of its striking members equally badly, as ALPA did here.

The subjective hostility standard is unsatisfactory for another reason. Irrational acts are often powerful evidence that a union's conduct is motivated by discrimination or bad faith. To ignore irrationality and to require plaintiffs to prove subjective hostility when unions, particularly sophisticated ones like ALPA, can easily hide any "smoking guns," will severely undercut a member's

²⁴In the present case ALPA acknowledged that, after August 23, 1985, it proceeded to bargain as the common law agent of the pilots, making the agency analogy particularly apt (R 131, pp. 27-31).

ability to challenge even gross union misconduct. "To foreclose juries from examining the evidence and drawing the appropriate inferences in such cases is to virtually guarantee that such union conduct will never be remedied." M. Goldberg, *The Duty of Fair Representation*, 34 Buffalo L. Rev. 89, 148 (1985). Without a standard that holds out the possibility of judicial review when the union acts arbitrarily or perfunctorily, the duty of fair representation becomes merely a paper promise, hardly a quid pro quo for the surrender of individual bargaining rights.

C. Judicial Application of the *Vaca* Standard Has Not Resulted in Excessive Interference With Union Autonomy.

ALPA asks this Court to reject the position of the O'Neill Group and the Solicitor General and to retreat from *Vaca* and all of its progeny for the stated reason that judicial review for arbitrariness or irrationality will result in excessive judicial oversight at the expense of union autonomy. ALPA's argument is pure fantasy. The circuit courts of appeal have uniformly applied the *Vaca*

standard to union conduct in negotiations for years without the ill effects that ALPA predicts.²⁵

The lower courts are careful to ensure that the union misconduct at issue is truly arbitrary and not merely negligent. Indeed, unions generally prevail unless there is wholesale abandonment by the union as there was here. The most exhaustive empirical study of union fair representation cases of which we are aware analyzed 809 decisions beginning in 1977, the year after this Court's decision in *Hines v. Anchor Motor Freight Co.*, 424 U.S. 554 (1976), nine years after *Vaca*, and in 1983. M. Gold-

²⁵For cases where the courts of appeal have applied *Vaca* to union negotiations, see *Barr v. United Parcel Service, Inc.*, 868 F.2d 36, 43 (2d Cir.), cert. denied, 110 S. Ct. 499 (1989); *Haerum v. Air Line Pilots Association*, 892 F.2d 216, 221 (2d Cir. 1989); *Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1013-14 (3d Cir.), cert. denied, 434 U.S. 837 (1977); *Burchfield v. United Steelworkers of America*, 577 F.2d 1018, 1020 (5th Cir. 1978); *Ackley v. Local Union 337, Int'l Brotherhood of Teamsters*, 910 F.2d 1295 (6th Cir. 1990); *Morgan v. St. Joseph Terminal R. Co.*, 815 F.2d 1232, 1234 (8th Cir.), cert. denied, 484 U.S. 846 (1987); *American Postal Workers Union Local 6885 v. American Postal Workers Union*, 665 F.2d 1096, 1105 (D.C. Cir. 1981).

In its opening brief, ALPA incorrectly asserts that the Ninth Circuit applies a subjective hostility standard to negotiations and restricts *Vaca* to grievance handling (pp. 12-13, n.6). Just last year, that circuit decided *Bernard v. ALPA*, 873 F.2d 213, 216 (9th Cir. 1989), in which the *Vaca* test was applied in determining ALPA had breached its duty of fair representation when it negotiated for discriminatory contract provisions that militated against nonmembers. In addition, ALPA incorrectly characterizes the Eleventh Circuit opinion in *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), cert. denied, 109 S. Ct. 2066 (1989), as requiring subjective hostility in the negotiation context. The court there actually restated the *Vaca* standard. *Id.* at 1520. Finally, ALPA cites *Dober v. Roadway Express, Inc.*, 707 F.2d 292 (7th Cir. 1983) and *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242 (7th Cir.), cert. denied, 477 U.S. 908 (1986), for the proposition that judicial review is unnecessary to curb union misconduct. These cases are unpersuasive because they essentially eliminate the duty of fair representation altogether. They have not been followed outside the Seventh Circuit.

berg, *The Duty of Fair Representation*, 34 Buffalo L. Rev. 89 (1985). Contrary to ALPA's doomsday predictions, the study reported little or no deleterious effect on union conduct as the result of the *Vaca* standard. *Id.* at 158. Interestingly, the study also noted that ALPA had a disproportionately large number of cases charging union misconduct given its small size. *Id.* at 122.

ALPA also overreaches when it argues that the *Vaca* standard will seriously undermine the national labor policy favoring collective bargaining. The converse is more likely. We doubt whether any employees would surrender their individual rights to collective bargaining if there was no check on the arbitrary exercise of union power. Moreover, ALPA's argument was rejected in *Vaca* and in *Breininger v. Sheet Metal Workers International*, 110 S. Ct. 424 (1989). The purpose of the duty of fair representation is not to further federal labor policy, but to protect employees from arbitrary union conduct and to compensate them for their individual injuries. As Justice White once noted, the courts (not the NLRB) are the "primary guardians of the duty of fair representation." *Czosek v. O'Mara*, 397 U.S. 25, 27 (1970).

Finally, the subjective hostility standard ALPA proposes would, to quote *Breininger*, "eliminate some of the prime virtues of the duty of fair representation — flexibility and adaptability." 110 S. Ct. at 436. The *Vaca* standard is easily articulated and provides the appropriate measure of guidance to the lower courts, who then apply it to the variety of situations that implicate the duty of fair representation. The critical question is the application of the *Vaca* standard to the facts of each case. To these facts we now turn.

II. Whether ALPA Breached Its Duty Of Fair Representation In This Case Cannot Be Resolved On Summary Judgment; It Is A Question For The Trier Of Fact.

A. Summary Judgment Is Singularly Inappropriate Here.

We believe that this Court granted certiorari to confirm that the *Vaca* standard applies to all union conduct because that was the question presented in ALPA's petition for certiorari. We do not believe this Court granted certiorari to re-write the standards for summary judgment.²⁶ Yet ALPA argues, with the Solicitor General's concurrence, that all of its misconduct should be excused because it was legally uncertain about the rights of returning strikers in 1985 and, therefore, struck the best deal that it could. ALPA cites no evidence in the record that its officers ever considered or were motivated by legal uncertainty in their rush to end the strike. To the contrary, and as we shall develop, the actual evidence is that ALPA was advised and believed that the law was clear (and it was), and that the law entitled returning strikers to fill all vacancies and to retain their seniority rights.

²⁶The standard for summary judgment promulgated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986), mirrors that for a directed verdict. Furthermore, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." 477 U.S. at 255. See also *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (analyzing summary judgment in the context of the nonmoving party's burden of proof); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (same).

Given the variety of facts that must be considered in deciding whether a union has met its duty of fair representation, it is not surprising that the law defining the duty of fair representation has developed in cases tried to juries, not in summary judgments. *Chauffeurs Local No. 391 v. Terry*, 110 S. Ct. at 1354 (Stevens, J. concurring), citing *Vaca v. Sipes*, 386 U.S. 171 (1967); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979); and *Bowen v. United States Postal Service*, 459 U.S. 212 (1983).

Thus, to accept ALPA's proffered excuse is to accept as true facts that are either not in the record or are in dispute, and to ignore the competing inferences that can be drawn from the facts that are in the record. Certainly there already is enough evidence for a reasonable jury to conclude that ALPA was motivated by anything *but* its legal uncertainty.²⁷ This Court should not accept ALPA's invitation to act as the factfinder here.

In addition, ALPA and the Solicitor General ignore other aspects of ALPA's misconduct that independently compel a finding that ALPA breached its duty to those pilots. Summary judgment, under the principles stated by this Court and applied by the Fifth Circuit, was error.

B. ALPA's *Post Hoc* Rationalizations for Its Conduct Are Without Merit.

We disagree with ALPA and the Solicitor General's accusation that the Fifth Circuit improperly engaged in *post hoc* analysis of ALPA's conduct. The reverse, in fact, is true. The reasons offered by ALPA for its conduct are *post hoc*; indeed, they are for the most part pure argument of counsel. It is telling, for example, that both ALPA and Continental have relied on material in their

²⁷"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . ." *Anderson v. Liberty Lobby*, 477 U.S. at 255.

briefs that is *not in the record* below to support their arguments here.²⁸

If one were to read the briefs of the Solicitor General and ALPA, one would conclude that the union here was at most negligent because it was honestly torn as to its rights and remedies in October 1985 and struggled against a recalcitrant employer to get the best deal it could for the pilots who had gone out on strike. The "honesty" of ALPA's legal uncertainty argument is a disputed issue of fact. There is no evidence in this record that the union negotiators were troubled about their legal entitlement to the 85-5 bid positions or to any subsequent positions. There is no evidence in this record that they pressed the point with Continental (this latter is not surprising given the earlier directive from union leadership on high that the strike was to be terminated).²⁹ There is no evidence in this record that the

²⁸Out of all of the deposition testimony ALPA has cited to this Court, none of the cited pages were cited in the Motion for Summary Judgment, reply or response to the Motion for Reconsideration filed in the district court, and only one page was cited in the Fifth Circuit. These items therefore are not properly a part of the record on appeal. *Ricciardi v. Children's Hosp. Medical Center*, 811 F.2d 18 (1st Cir. 1987) (deposition filed but not brought to court's attention not considered on appeal); *Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.*, 776 F.2d 646, 649 n. 1 (7th Cir. 1985) ("evidence not presented to the trial court may not be offered on appeal"); 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure: Jurisdiction* § 3956 (1977); 9 J. Moore, *Moore's Federal Practice* ¶ 210.04 at 10-15 (1982).

Even the arguments of counsel are new. ALPA's summary judgment motion asserted that the settlement was a court order, not an act of ALPA, and that ALPA owed no duty because it was not the pilots' statutory bargaining representative. Therefore, ALPA made no effort to support its motion with affidavits or other evidence that it acted rationally, honestly, or in good faith.

²⁹Continental itself had every incentive to settle the strike in October 1985 because the settlement would enhance its ability to get its plan of reorganization confirmed (R 163, Att. 2.4, p. 4). Thus, the alleged intransigence of Continental is also a fact dispute.

negotiators honestly believed what they were doing was reasonable. To the contrary, MEC negotiating committee chairman Schnell's testimony states that they had gone *beyond* what was reasonable.

In fact, the law was not uncertain: strikers were entitled to fill vacancies and the 85-5 bid openings were vacancies. See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) (returning strikers entitled to reinstatement); *Randall v. NLRB*, 687 F.2d 1240 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983) (unfair labor practice for employer to advance nonstrikers to special-rated positions before reinstating strikers).

The facts demonstrate that ALPA's actual view of the law was the view it successfully advanced in the district court in the United Airlines litigation: the strikers were entitled to return with seniority intact and to fill *all* vacancies. *ALPA v. United Air Lines, Inc.*, 614 F. Supp. 1020 (N.D. Ill. 1985)³⁰. The legal advice the high echelons of ALPA received was: (1) if the pilots had made an unconditional offer to return to work they would retain their seniority (R 163, Att. 5.5, pp. 165-70); (2) Continental had been willing to recall striking pilots in seniority order since before August 1984 (R 163, Att. 5.5, pp. 53-54); (3) Continental had returned striking machinists and flight attendants in seniority order following their unions' unconditional offers to return to work; (4) "the normal rule was that the company would be obligated to recall strikers in order of seniority..." (R 163, Att. 5.5, pp. 160-61); and (5) an unconditional offer

³⁰This Court may, of course, take notice of ALPA's position, successfully taken, in the prior United litigation, and should do so to prevent ALPA from playing fast and loose with facts material to its state of mind. See 9 Wright & Miller, *Federal Practice and Procedure: Civil* § 2410 at 359-61 (1971). See, e.g., *MGIC Indemnity Corp. v. Weisman*, 803 F.2d 500, 504-05 (9th Cir. 1986) (taking judicial notice of a motion filed by a party in another proceeding to note its knowledge of material facts at a prior time).

to return to work would allow Continental pilots to preserve their litigation against Continental (R 163, Att. 5.5, pp. 157-58), which was one of the MEC's objectives in a strike settlement (R 163, Att. 5.1, pp. 678-79).

In addition, ALPA had asked Continental during the September 1985 MEC meeting how Continental would treat strikers after an unconditional offer to return, and received the response that Continental would recognize an unconditional offer by ALPA on behalf of striking pilots and return them all to work in seniority order (R 163, Att. 5.5, pp. 165-70). This communication, which was before the 85-5 bid award, was not reported to the MEC.³¹

We recognize and will address in part III, *infra*, ALPA's argument that Continental had no legal obligation to return striking workers with their seniority intact, particularly in respect to the 85-5 bid. The trier of fact in this case, however, could find that regardless of any legal requirement Continental *would* have returned workers with seniority intact based on its historical practice and on the conversations it had with ALPA representatives in September 1985, that ALPA knew this, and

³¹In its amicus brief Continental relies almost exclusively on materials outside this record to argue that it would not have taken the strikers back because it had no legal obligation to do so. We therefore advise the Court that if this matter goes to trial we shall offer as evidence an internal memorandum that Continental circulated to the nonstrikers in August 1985, after the district court's decision in *ALPA v. United Air Lines, Inc.*, that was disclosed in a related piece of litigation. In that memorandum, Continental concisely restates the law governing the rights of returning strikers. In Continental's words:

As you are well aware, we have consistently allowed returning strikers to bid on an equal — according to seniority — basis with working pilots for new vacancies, *as required by law*. That practice is consistent with what the court in Chicago has ruled: that *artificial and unnecessary preference or superseniority is illegal in the United case*.

(Emphasis added.)

that ALPA ignored it. ALPA's actual knowledge of the law is highly relevant where, as here, it attempts to excuse misconduct on the grounds of its own uncertainty as to how to proceed. See generally *Auriemma v. Rice*, 910 F.2d 1449, 1453 (7th Cir. 1990) (where government agent's state of mind is in issue subjective inquiry into knowledge and motive appropriate) and cases cited therein.

Thus, the record evidence is not that the union here had no alternatives from which to choose and struck the best deal that it could. The record evidence is simply that union leadership did not want to be tagged with making an unconditional offer to return, even if that alternative was better than a negotiated settlement. Given the facts that existed at that time, there was no reason for the union to deviate from the position it took in respect to United Airlines and this unexplained decision is, itself, reason for finding that ALPA's conduct was arbitrary. See *Acadian Gas Pipeline System v. FERC*, 878 F.2d 865, 868 (5th Cir. 1989); *Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 882 (D.C. Cir. 1978).

We respectfully suggest that ALPA and the Solicitor General are just plain wrong. It is they, not the Fifth Circuit, who are guilty of hindsight review.

C. Independent Factors Show that ALPA Breached Its Duty of Fair Representation.

Even if one conceded that the law was unclear and that Continental was intransigent, that does not excuse ALPA's decision to settle the strike without the required authority, to misrepresent to the retired and resigned pilots that they would be included, to engage in a panoply of activities designed to disguise their own participation in and responsibility for the settlement terms, and to disenfranchise the striking pilots. This is not an isolated instance of mere negligence. It is a pattern of misconduct and deception culminating in a settlement that

has no justification in this record other than ALPA's failure to satisfy the duty of fair representation.

1. ALPA exceeded its authority.

The MEC Policy Manual required MEC approval of any settlement ALPA reached with Continental. In addition, the MEC passed a resolution at the beginning of the strike requiring MEC approval of any agreement granting concessions to Continental (R 132, p. 17; R 163, Att. 5.1, pp. 507-513).³² ALPA represented throughout the strike that it would bring any settlement to the pilots as a whole for a vote (R 149, Ex. 47, ¶ 2, Exs. 48, 49, Ch. 17, p. B000048; R 163, Att. 7.23, Z012255). ALPA thus exceeded its authority by agreeing to the strike settlement without first consulting or obtaining approval from its striking members and the MEC.

Exceeding the scope of authority would be a breach of a representative's duty in any capacity, and should be here. *E.g.*, *Brown v. Blue Cross & Blue Shield of Alabama*, 898 F.2d 1556, 1564 (11th Cir. 1990), petition for certiorari filed Sept. 17, 1990; *Rollins v. May*, 473 F.Supp. 358, 363 (D.S.C. 1978), *aff'd*, 603 F.2d 487 (4th Cir. 1979). Breaking a promise to allow union members to ratify any

³²This point was disputed in the district court. ALPA argued below that a later secret resolution in 1984 rescinded the 1983 MEC resolution on ratification and gave the negotiating committee authority to settle, which authority was then "transferred" to the pilot negotiators by Resolution 3 in 1985 (R 153, p. 16). This interpretation is incorrect (R 149, Ex. 67, ¶ 6, 7). Minutes from a Los Angeles area pilot meeting in April 1985 confirm that the 1983 ratification resolution was still in effect in 1985 (R 163, Att. 15, p. Z011360), and chief pilot negotiator Schnell testified that he never even knew about the 1984 resolution (R 163, Att. 5.2, pp. 1470-71, 2031-33). There also was MEC member testimony that any agreement had to be brought back to the pilots for a vote (R 149, Ex. 75). Finally, by its terms, the 1985 resolution only authorized the designated negotiators to pursue a resolution to the strike, without mentioning ratification or the 1984 resolution, or granting authority to reach a final agreement (R 149, Ex. 3.1, p. Z002985).

agreement and violating the union policy requiring at least MEC approval also breaches the duty of fair representation. See *Acri v. International Association of Machinists & Aerospace Workers*, 781 F.2d 1393, 1397 (9th Cir.), cert. denied, 479 U.S. 816 (1986); *Alexander v. International Union of Operating Engineers*, 624 F.2d 1235 (5th Cir. 1980).³³

2. ALPA tried to disguise what it did.

Having exceeded its authority in agreeing to a strike settlement and having compounded that failure by acceding to a settlement that left striking pilots worse off than an unconditional offer to return to work, ALPA entered into a pattern of deception and misrepresentation as to how the settlement was reached and what its terms were. ALPA represented, for example, that the bankruptcy court had "imposed" the strike settlement without any participation by ALPA (R 149, Exs. 14, 15). The reverse was true. As early as October 18, 1985, president Duffy sent a mailgram to the ALPA board of directors that "preliminary meetings . . . will continue through this weekend under Judge Roberts' supervision with our purpose being to get a court order with rules governing the orderly return to work" (emphasis supplied) (R 163, Att. 7.3). Bruce Simon, ALPA's lawyer, originally asked

³³Contrary to ALPA's suggestions, the LMRDA is not the sole remedy against union misrepresentations as to approval rights. The LMRDA grants a statutory voting right whenever a union's constitution or bylaws require it, 29 U.S.C. § 411(a)(1). In the present case, the pilots and the MEC placed additional limitations on ALPA's authority, not found in its constitution or bylaws, and ALPA accepted these provisions and represented to the pilots that it would follow them. While ALPA's breach of these promises may not violate the technical requirements of the LMRDA, nothing in that Act suggests that a union cannot voluntarily assume additional ratification responsibilities and breach its duty of fair representation if it fails to meet these additional requirements. See *Alexander v. International Union of Operating Engineers*, 624 F.2d 1235 (5th Cir. 1980).

the bankruptcy judge to "be creative" and enter the settlement as an order and award (R 163, Att. 4, 013483).

When this master plan was in place, ALPA kept the final set of Continental negotiations secret and manufactured the excuse of a "gag order" imposed by the bankruptcy court to avoid required communications with the MEC. There was no gag order and, in fact, Continental was fully apprising the working pilots as the negotiators proceeded. Once the bankruptcy court indicated its willingness to enter the settlement as a court order, therefore relieving president Duffy from having to sign it, ALPA conceded *all significant issues* to Continental.

After the order and award was entered, ALPA told its members it would have no effect on seniority (R 149, Ex. 15). This was untrue (JA 11-15). ALPA then falsely denied any responsibility for the terms and conditions of the settlement, when in fact it had agreed to all of the material terms and conditions before the bankruptcy court approved the proposed order and award (R 163, Att. 5.6, pp. 157, 179).

We ask a question that we do not intend to be rhetorical. If the strike settlement truly was the best deal that could be struck, why did ALPA go to such pains to disguise it? ALPA's deceptions may not, by themselves, prove that the settlement was arbitrary. They certainly are evidence from which a reasonable jury could infer that the union itself knew it had acted arbitrarily in ending the strike when it did and on the terms to which it agreed.

3. ALPA defeated the union democratic process.

ALPA, in advocating its limited standard of review, and the Solicitor General, in excusing the union's performance here, argue that the ultimate check on rogue union action is the union democratic process. This process theoretically allows union members to "throw the rascals out" at regularly scheduled elections.

We realize that, as Judge Easterbrook develops, one recourse for union members dissatisfied with their leadership is to vote for other officers. *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d at 244. But when, as is part of the whole offensive conduct here, the victims are disenfranchised, the union must expect closer scrutiny. In the now famous "Carolene Products Footnote 4," the Court noted that an active judicial role can be justified when the Court is enforcing, *inter alia*, "rights of the political process," 3 Rotunda, Novak & Young, *Constitutional Law*, p. 475 (West Pub. Co. 1986); see *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53, n.4 (1938); for subsequent development and the view that the courts must protect the openness of political processes, see J. Ely, *Democracy and Distrust*, p. 75 (1980). To put it baldly, on these facts a jury might reasonably conclude that the union abandoned its striking members and then cut off their only remaining self-help recourse by disenfranchising them. Here is how ALPA did it:

First, ALPA circumvented the very union procedures designed to ensure fair representation and adequate accountability during the negotiation process. These procedures had been implemented by the MEC after a prior group of negotiators (in a different matter) had failed to keep the MEC informed.

Then, almost immediately after the entry of the order and award, ALPA placed the MEC in custodianship and put all the striking pilots in the membership category of "inactive status." By placing the striking pilots in this category, ALPA deprived them of the right to vote in the next ALPA election.

While ALPA explained the custodianship on the grounds that the pilots were on strike and their employer was bankrupt, its explanation is not persuasive. ALPA waited until two years after Continental's bankruptcy filing to take this action. Moreover, ALPA allowed a group of pilots who flew for Frontier Airlines, which had

merged into Continental and therefore who were in identical circumstances, to continue their active union status. Not surprisingly, at the next union election president Duffy retained his office by the narrowest of margins. This margin would not have existed but for the disenfranchisement of the pilots seeking relief here.

4. ALPA agreed to a strike settlement that was worse than an unconditional offer to return to work.

The process ALPA followed in prematurely ending the strike resulted in a settlement that was, in the district court's words, "atrocious in retrospect." That the settlement was bad does not automatically mean that ALPA violated its duty of fair representation. The jury is entitled, however, to review ALPA's decision to opt for the settlement in its appropriate factual context, and to conclude that it was irrational and arbitrary.

Based on this record, a jury could find that ALPA unilaterally decided to end the strike and ignored the established negotiating procedures to affect that end. It told retired and resigned pilots they would be protected long after cutting them out of the negotiations.³⁴ It kept the pilots' MEC representatives in the dark as to the negotiations, and fabricated a "gag order" from the bankruptcy court to explain the silence. It ignored the readily available alternative of an unconditional offer to return to work, and declined to inform the MEC of that alternative when it became known to ALPA. It reached a

³⁴ALPA's conduct was clearly arbitrary as to the pilots who retired and resigned based upon ALPA's representations that they would still be included in a settlement when, in fact, ALPA had already agreed with Continental to cut them out. See *Thomas v. Bakery Workers Local 433*, 826 F.2d 755 (8th Cir. 1987), *cert. denied*, 484 U.S. 1062 (1988) (union breached duty of fair representation when it "knew that plaintiffs' jobs were at risk, refused to negotiate to protect their interests, and then lied to one of them about their precarious situation"); *NLRB v. Local 282*, 740 F.2d 141 (2d Cir. 1984); *NLRB v. American Postal Workers Union*, 618 F.2d 1249, 1255 (8th Cir. 1980).

settlement which distinguished among pilots based upon the irrelevant and impermissible factor of whether they participated in the strike. It presented the settlement to the bankruptcy court for entry as a final, binding and nonappealable court order without approval by the MEC or a vote by the pilots. Then, in the end, rather than articulate a rational, reasonable basis for ignoring the normal negotiating procedures and agreeing to the settlement, ALPA denied any responsibility for it.

These facts, taken together, do not permit a court to determine on summary judgment that ALPA's conduct was "inclusive of a fair and impartial consideration of the interests of all employees." *Tedford v. Peabody Coal Co.*, 533 F.2d at 957. They demonstrate instead that ALPA acted arbitrarily, outside of required procedures, and in breach of its duty of fair representation. *Id.*; see *Alexander v. International Union of Operating Engineers*, 624 F.2d 1235, 1240-41 (5th Cir. 1980); *Robesky v. Qantas Empire Airways Ltd.*, 573 F.2d 1082, 1089 (9th Cir. 1978).

5. At the very least the record presents triable issues of ALPA's motives and intent.

Even by ALPA's proposed standard of subjective hostility, summary judgment was wrong because there are issues of fact as to ALPA's motive and intent. See, e.g., *International Union of Operating Engineers Local 406 v. NLRB*, 701 F.2d 504, 508 (5th Cir. 1983) (trier of fact may infer discriminatory animus from circumstances surrounding union's departure from normal procedures); *Jones v. Western Geophysical Co.*, 669 F.2d 280 (5th Cir. 1982); *Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914 (7th Cir. 1974).³⁵

After two years, the Continental strike had become an obvious blemish on Duffy's record as ALPA president and a threat to his reelection. Yet he could not afford to end

³⁵The Solicitor General appears to agree that there are triable issues as to ALPA's bad faith in this case. Amicus Brief, p. 30, n.22.

the strike by "surrendering" over the objection of the Continental MEC. Therefore, ALPA counsel Bruce Simon, participating in the final negotiations as Duffy's personal delegate, devised the strategy of submitting the secret settlement to the bankruptcy court for issuance as a court order.

A trier of fact could infer motives of personal gain and bad faith from this record.³⁶ Such inferences would support the pilots' claim that ALPA breached its duty of fair representation by acting in response to those motives rather than the pilots' best interests at the time. As this Court has held: "The bargaining representative, . . . is responsible to, and owes complete loyalty to, the interest of all whom it represents." *Ford Motor Co. v. Huffman*, 345 U.S. at 338. Accordingly, union action based on prospects of political gain or for reasons of political expediency breaches the duty of fair representation. See *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 800 (7th Cir. 1976) (remanded with instructions "that in order to be absolved of liability the [u]nion must show some objective justification for its conduct beyond that of placating the desires of the majority of the unit employees at the expense of the minority"); *Truck Drivers Local 568 v. NLRB*, 379 F.2d 137 (D.C. Cir. 1967).

III. The Settlement Impermissibly Discriminates Between Strikers And Strikebreakers Solely Because The Strikers Engaged In Concerted Activity.

ALPA also breached its duty of fair representation by agreeing to a discriminatory settlement that confers superseniority preferences on nonstrikers after the strike. These preferences extended to the most desirable job vacancies available when the strike ended, and thereafter to all captain vacancies pursuant to a 1:1 ratio. The

³⁶The secret settlement also included dismissal of litigation filed against one of the pilot negotiators, MEC Chairman Higgins (see JA 33; R 149, Ex. 114, ¶ 13), raising a further issue of personal gain and bad faith.

1:1 ratio required one nonstriker to advance to captain, out of seniority, for each returning striker who would otherwise be entitled by virtue of seniority to become a captain. Such post-strike superseniority is unlawful under the RLA, has a long-lasting effect, and, when agreed to by a union, constitutes a breach of the duty of fair representation.

A. The Settlement Discriminated Against Striking Pilots.

There is little dispute in the prior briefs that post-strike superseniority preferences favoring nonstriking employees are unlawful under the RLA. *Trans World Airlines v. Independent Federation of Flight Attendants*, 109 S. Ct. 1225 (1989) (hereafter "*TWA v. IFFA*"); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954). ALPA downplays the superseniority aspects of this settlement and then characterizes the superseniority as temporary or transitional as if such discrimination is lawful if it does not last too long.³⁷ The record and the applicable law for ALPA's position are otherwise.

1. The 1:1 ratio for post-strike bidding discriminated against returning strikers.

The record is undisputed that before and during the strike Continental awarded pilot positions according to a seniority bidding system in which seniority was measured by original date of hire. In the airline industry, the seniority system fulfills a basic requirement for airline safety. It also rewards pilots for their years of service with the airline because captain is the most prestigious

³⁷This is yet another area that illustrates the inappropriateness of summary judgment. In the *United* case, ALPA submitted substantial evidence of the discriminatory aspects of United's rebid procedure. See *ALPA v. United Air Lines, Inc.*, 614 F. Supp. 1020 (N.D. Ill. 1985). Here, discovery into the discriminatory aspects of the settlement agreement was cut short by the district court's grant of summary judgment (R 149, Ex. 114).

and highest paying pilot position, as well as the position of greatest flying responsibility in the cockpit. Indeed, the opportunity to bid captain is the single most important aspect of pilot seniority and why seniority is crucial to an airline pilot (R 149, Ex. 81, p. 340).

Putting aside the 85-5 bid positions and the discriminatory manner in which ALPA agreed to allocate them, the settlement altered this seniority bidding system to provide that all post-strike, post-85-5 bid captain positions would be allocated on a 1:1 ratio between pilots who went on strike and pilots who did not.³⁸ No other criteria would be used in the post-strike bidding — half the post-strike captain positions were to be awarded to non-strikers in preference to the returning strikers regardless of their relative seniority, experience or flying ability.

The adverse effect of this superseniority preference on the striking pilots is direct and long-lasting. Nonstrikers who have been given captain positions cannot be bumped, and therefore hold their captaincies in preference to more senior returning strikers as long as they so desire. Moreover, even though the 1:1 ratio applies only to returning strikers' initial post-strike captain positions, theoretically allowing them to bid without restriction on the nonstriker side of the equation thereafter, they are locked into their initial positions by virtue of various

³⁸The Solicitor General simply misapprehended the record facts in concluding that the 1:1 ratio applied only until the strikers returned to work. Amicus Brief, p. 33. In fact the ratio applied *after* they returned to work because, contrary to Continental's practice during the strike, the settlement precluded pilots from bidding while they were awaiting recall from the preferential recall list. The Solicitor General further misapprehended the record facts in concluding that the only permanent effect of the settlement was to allow nonstrikers to retain positions obtained during the strike. *Id.* In fact the 1:1 ratio allowed nonstrikers to obtain captain positions *after* the strike, in addition to the 85-5 bid captain positions allocated to them in the settlement.

"equipment freezes" that limit a pilot's opportunity to bid from one aircraft to another for specified numbers of years (R 149, Ex. 103, Sec. 18). It is no wonder that MEC negotiating committee chairman Schnell concluded that the settlement "bastardized [seniority] beyond all recognition" and "f—ked my people forever" (R 149, Ex. 1).

For a concrete example, as of December 23, 1987, more than two years after the strike ended, the next pilot who would become a captain was a nonstriker who had worked at Continental for four years and held seniority No. 1442. In line *after* him was a returning striker who had worked for 23 years, had seniority No. 65 and had flown as a captain at Continental for more than 14 years before the strike. It is likely that pilot No. 65 was flying as a captain at Continental before pilot No. 1442 was old enough to drive, but under the settlement pilot No. 1442 would become a captain ahead of pilot No. 65 and effectively receive 19 years of seniority credit for not participating in the strike. This preference is nearly identical to the 20-year seniority credit this Court held unlawful in *NLRB v. Erie Resistor Corp.*

Contrary to ALPA's brief (p. 5 n.3), there is not a shred of record evidence, and none is cited, for the assertion that "this [1:1] formula was necessary during the post-strike transition period to facilitate an orderly integration of striking pilots back into the work force." Indeed, the ratio applied to bids submitted by strikers *after* they returned to work, well beyond the strike settlement date, and not during their transition back to work.³⁹ It is hard to imagine there could be any legitimate business reason for advancing less senior, less expe-

³⁹Under the settlement terms the 1:1 ratio would continue on all bidding done through at least December 31, 1988, more than three years after the strike ended, and indefinitely thereafter subject to arbitration (JA 14).

rienced pilots to the most important seat in the cockpit solely because they did not strike.⁴⁰

2. Revisions to the pilot seniority list gave permanent superseniority to the replacement pilots Continental hired during the strike.

The settlement also altered the Continental pilot seniority list to place Continental's permanent replacements, the new pilots Continental hired during the strike as distinguished from pilots who crossed the picket line ahead of the striking pilots who were at the end of the pre-strike seniority list. This change, totally ignored in prior briefs, gave the replacement pilots permanent superseniority over the affected strikers.

3. The allocation of 85-5 bid captaincies to nonstrikers was improper.

ALPA also agreed to give the first 100 captain positions on the 85-5 bid to nonstrikers out of seniority and in preference to returning strikers.⁴¹ It is undisputed that the 85-5 bid was for positions Continental projected for 1986, and that these positions were unstaffed when the strike ended on October 31, 1985. There is no evidence that nonstrikers had even begun training for these new positions before the strike was settled. The nonstrikers merely held bid awards, or promises from Continental that they would be advanced to those positions

⁴⁰Continental asserts in its brief that it unilaterally removed the 1:1 ratio in late 1987, which suggests that there was no legitimate operational reason for it in the first place.

⁴¹The pilots have uncovered evidence in other litigation against Continental that reveals that the nonstrikers who received their choices for the first 100 85-5 captaincies ranged in seniority from Nos. 1082 to 1454 and had one to seven years of service (see R 163, Att. 13). In comparison, the first returning striker eligible under Option 1 to be assigned to a captaincy had seniority No. 2 and 34 years of service. *O'Neill v. Continental Air Lines, Inc.*, No. H-87-259, pending in the United States District for the Southern District of Texas (plaintiffs' motion for partial summary judgment, Aff. of K. Kunde).

in the future; there was no issue of displacing the non-strikers from positions they held during the strike. See *TWA v. IFFA*. These positions were vacancies and the returning strikers were entitled to them. *Id.*; *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); see *Randall v. NLRB*, 687 F.2d 1240, 1243 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983) (unlawful for employer to advance nonstrikers to special-rated jobs before reinstating strikers).

B. ALPA's Discrimination Was Unlawful.

The record shows that ALPA's discrimination was intentional (at least ALPA negotiator Schnell knew the result), direct (ask pilot No. 65) and long-lasting (according to Schnell "forever"). Such discrimination based as it is on the employees' participation in statutorily protected conduct, is invidious, unrelated to any lawful purpose and, when done by a union, in breach of the duty of fair representation.

The superseniority preferences ALPA agreed to give nonstriking pilots, at the expense of the returning strikers, are fundamentally and undeniably unlawful under the labor statutes, as this Court has held in every case that has addressed the issue. *TWA v. IFFA*, 109 S. Ct. 1225 (1989); *NLRB v. Erie Resistor*, 373 U.S. 221 (1963); *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954).

In *Erie Resistor* the Court held squarely that post-strike superseniority preferences that discriminate against employees on the basis of their participation in lawful strike activity are unlawful. Substitute the word "bid" for "layoff" and the Court could have been writing about this case when it concluded:

A super-seniority award necessarily operates to the detriment of those who participated in the strike as compared to nonstrikers. [It] creates a cleavage in the plant continuing long after the strike is ended. Employees are henceforth divided into two camps:

those who stayed with the union and those who returned before the end of the strike and thereby gained extra seniority. This breach is reemphasized with each subsequent layoff and stands as an ever-present reminder of the dangers connected with striking and with union activities in general.

[S]uperseniority by its very terms operates to discriminate between strikers and nonstrikers . . . and its destructive impact upon the strike and union activity cannot be doubted.

373 U.S. at 230-31. The Court therefore upheld the NLRB's determination that post-strike superseniority is illegal *per se* under federal labor law. *Id.*

The circuit courts of appeal likewise are unanimous in holding that superseniority is illegal. See *NLRB v. Bingham-Willamette Co.*, 857 F.2d 661 (9th Cir. 1988); *ALPA v. United Air Lines, Inc.*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987) (superseniority preferences to nonstriking pilots illegal under RLA); *Independent Federation of Flight Attendants v. Trans World Airlines*, 819 F.2d 839 (8th Cir. 1987), *rev'd in part on other grounds*, 109 S. Ct. 1225 (1989); *George Banta Co. v. NLRB*, 686 F.2d 10, 18-20 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983) (unlawful for employer to grant preferential reinstatement and seniority rights to employees who abandoned the strike before it ended); *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835, 841-42 (5th Cir. 1978) (unlawful discrimination to assign returning strikers to less desirable shifts); *NLRB v. Transport Co. of Texas*, 438 F.2d 258 (5th Cir. 1971) (nonstrikers and strikers must be treated equally after a strike and cannot be put in separate groups for purposes of lay-off rights); *Great Lakes Carbon Corp. v. NLRB*, 360 F.2d 19, 21-22 (4th Cir. 1966) (superseniority plan favoring employees who worked during a strike is unlawful on its face).

C. ALPA's Agreement to a Discriminatory Settlement Breached Its Duty of Fair Representation.

A union does not have the power to negotiate without limitation.⁴² "[I]t is enough for present purposes to say that the statutory power to represent a craft and to make contracts . . . does not include the authority to make among members of the craft discriminations not based on such relevant differences." *Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 203 (1944). *Accord Hettenbaugh v. ALPA*, 189 F.2d 319, 321 (5th Cir. 1951).

Consequently, a union breaches the duty of fair representation when it negotiates a superseniority system that discriminates against some employees on unlawful grounds such as race, sex or protected activity. *Id.*; *Bernard v. ALPA*, 873 F.2d 213, 216 (9th Cir. 1989) (ALPA breached duty of fair representation in seniority merger proceedings; "[w]ide latitude . . . does not mean a union may discriminate on the basis of union membership"); *Bowman v. Tennessee Valley Authority*, 744 F.2d 1207 (6th Cir. 1984) (union's agreement to seniority provisions which discriminated on basis of concerted activity breached its duty of fair representation), *cert. denied*, 470 U.S. 1084 (1985); *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 797 (2d Cir. 1974) (discrimination in seniority

⁴²ALPA's discussion of recall rights must be distinguished from the discriminatory treatment afforded strikers *after* they have been recalled. See, e.g., *Lone Star Industries*, 122 LRRM (BNA) 1162 (1986) (employer could maintain prior reinstatement practice at conclusion of strike but committed unfair labor practice by discontinuing seniority bidding practice after the strike). Additionally, ALPA's assertions that a union can waive the pilots' rights to be free from discrimination is incorrect. See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705-06 (1983) (union may bargain away its members' economic rights, but it may not make concessions that deleteriously affect the employees' rights to engage in concerted activity); *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974). As this Court has held, superseniority is unlawful precisely because it impairs the employees' rights to engage in concerted activity. *NLRB v. Erie Resistor Corp.*, 373 U.S. at 231.

based on union membership is arbitrary and invidious and violates the union's duty to represent fairly all members of the bargaining unit); *Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252, 282 (N.D. Ind. 1977) (granting summary judgment where union discriminated against female employees). ALPA cites no authority holding otherwise because there is none.⁴³

ALPA and the Solicitor General nonetheless suggest that Continental could have imposed the same superseniority based upon legitimate business justifications for doing so. This point is immaterial because the record shows that Continental did not assert any business justification in these negotiations.⁴⁴ It also is wrong. *Erie Resistor*, 373 U.S. 221. See *TWA v. IFFA*, 109 S. Ct. at 1239 n.5 (Brennan, J. dissenting) ("in *Erie Resistor* we held grants of superseniority to be *per se* illegal, regardless of the business necessity that might be found in the particular case . . ."). See also 45 U.S.C. § 152, Eighth

⁴³*Continental Gem City Ready Mix Co. & Jack Roberts*, 270 NLRB No. 1260 (1984), 1984-85 CCH NLRB ¶ 16467, does not stand for the proposition that a union and an employer can negotiate for superseniority. In that case an employer proposed to settle a strike under provisions which moved three nonstrikers up on the seniority list, the union put the proposal to membership vote and the membership approved it. The case holds only that the strikers waived their discrimination claim against the employer by ratifying the agreement, and the analysis makes clear that the union's agreement without ratification would violate labor law. See *Wallace Corp. v. NLRB*, 323 U.S. 248, 256 (1944) ("It was as much a deprivation of the rights of these minority employees for the company discriminatorily to discharge them in collaboration with [the union] as it would have been had the company done it alone.").

⁴⁴We are unaware of any authority which permits an employer to discriminate against strikers *after* a strike. Indeed, Continental had an announced policy that strikers were entitled to come back with their seniority (R 163, Att. 14.2), and advised ALPA in September 1985 that it would recognize their seniority upon recall. And the need to hire replacements to stay in business during a strike disappears when the strike ends and strikers are available for work.

("The provisions of said paragraphs (proscribing employer coercion) are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.") Indeed, it is an unfair labor practice for the employer to insist on such provisions. *Philip Carey Mfg. Co. v. NLRB*, 331 F.2d 720 (6th Cir.), cert. denied, 379 U.S. 888 (1964) (employer's insistence on a superseniority provision was an unlawful refusal to bargain and converted strike to an unfair labor practice strike).

That leaves only the issue of whether ALPA could nevertheless agree to these provisions if, as ALPA suggests, its backside was against the wall and Continental insisted on them as a condition of settlement. Put another way, can the union agree to do what the very statute that authorizes its existence makes unlawful? The answer must be no. See *UMW Health & Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982) ("The terms of any collective-bargaining agreement must comply with federal laws"); *Scofield v. NLRB*, 394 U.S. 423, 430 (1969) (union may not choose a position which interferes with a "policy Congress has imbedded in the labor laws"). Indeed, the essential holding in *Steele* was that the union cannot make agreements that discriminate in violation of federal law, and breaches a duty of fair representation when it does. 323 U.S. at 203 ("Congress plainly did not undertake to authorize the bargaining representative to make such discriminations."). See *Hettenbaugh v. ALPA*, 189 F.2d at 321 ("It is only when collective bargaining agreements are unlawfully entered into, or when the

agreements themselves are unlawful in terms or effect, that federal courts may act."). ⁴⁵

ALPA's inability to concede superseniority is compelled by the collective bargaining policies espoused by ALPA, the Solicitor General and Continental. ⁴⁶ Superseniority is unlawful because it discriminates against employees who participated in a strike called by their union, and thereby discourages their participation in the future. *Erie Resistor*, 373 U.S. at 232. The right to strike itself, however, "is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system." *Id.* at 234. See *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969) (recognizing employees' right to strike under the RLA).

There can be no effective collective bargaining if the employer, with the union's consent, can retaliate against strikers. Indeed, it is telling that the Continental pilots are still without a recognized union or a collective bar-

⁴⁵The RLA and NLRA differ in some respects but they are similar with respect to the back to work rights at issue here. See *TWA v. IFFA*, 109 S. Ct. at 1232-33 (recognizing that both statutes "protect an employee's right not to strike" and declining to impose limitations on employee rights at the conclusion of a strike under the RLA "beyond the limitations even imposed by the NLRA"); *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383-84 (1969). Thus, cases decided under either statute provide persuasive authority on these issues. See, e.g., *ALPA v. United Air Lines*, 614 F. Supp. 1020 (N.D. Ill. 1985), *aff'd in relevant part*, 802 F.2d 886 (7th Cir. 1986), cert. denied, 480 U.S. 946 (1987).

⁴⁶As for the Solicitor General's contention that an overriding goal of the RLA is to avoid interruptions to commerce, Brief, pp. 30-31, that goal is not advanced in the least by conferring benefits on non-strikers after a strike, when the strikers are themselves ready, willing and able to resume employment. *Erie Resistor*, 373 U.S. at 232. Superseniority also contravenes the RLA's express goal of "forbidding any limitation upon the freedom of association among employees." 45 U.S.C. § 151a.

gaining contact more than five years after this strike. If, under all the circumstances, ALPA was no longer willing or able to be the pilots' statutory representative, rather than acting contrary to these controlling principles, it should have just said so. The duty of fair representation, however, prevents a union from abandoning its members and agreeing to an illegal, discriminatory settlement. See *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976) (recognizing that the collective bargaining process cannot function if the union does not fulfill its obligations with some minimum degree of integrity); *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 70 (1975) ("union cannot lawfully bargain for the establishment or continuation of discriminatory practices").

CONCLUSION

This Court should affirm the Fifth Circuit ruling that the *Vaca* standard governs a union's duty of fair representation in a negotiation context. Under any standard that has been proposed to this Court, there are facts that require presentation to a trier of fact. We respectfully request that the standard adopted by the Fifth Circuit, and advocated by both the O'Neill Group and the Solicitor General, be adopted and that this case be remanded for trial under that standard.

RESPECTFULLY SUBMITTED.

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No. 89-1493

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
Petitioner,
v.
JOSEPH E. O'NEILL, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I. THE LEGAL STANDARD

The brief of the Solicitor General as *amicus curiae* frames the threshold question posed in this case through the argument that the duty of fair representation should be understood to encompass two distinct duties: a “duty of loyalty” and a “duty of care.” U.S. Br. at 8, 13. Plaintiffs—respondents in this Court—align themselves with the Solicitor General in this regard. See Resp. Br. at 18. Our contention, *per contra*, is that the representational duty implied from the Railway Labor Act’s grant of exclusive representational authority is a unitary duty of *fair* representation, akin to a duty of loyalty that does not provide for a duty of *adequate* representation, akin to a duty of care. The difference between these alternative positions is well illustrated by the facts of this case.

We begin from the premise that a “duty of loyalty” is implicated by a claim—quite common in fair representation litigation—that a union has entered into an agreement that favors some members of the bargaining unit and disfavors others. Thus, as we stated in our opening brief (at 24-25), we agree that insofar as plaintiffs contend that the settlement agreement between ALPA and Continental improperly disadvantaged one group of pilots, the claim may be judicially cognizable. Adjudicating such a claim turns on the union’s *basis* for distinguishing that group from others. That is so because the duty of loyalty does not allow a union to make such distinctions on *irrelevant or invidious* grounds. See Pet. Br. at 22-25.¹

Plaintiffs’ fundamental complaint here, however, does not turn on the differential—and disadvantageous—treatment of one group of unit members; rather, plaintiffs’

¹ In Parts II A2 and II B5, *infra*, we demonstrate that plaintiffs’ complaints concerning the differential treatment of strikers and permanent replacements in the strike settlement agreement do not support a duty of fair representation claim, because such differential treatment was not based on irrelevant or invidious grounds but was, as the district court found, based on relevant grounds.

claim is that the Union made a bad deal in settling with Continental. That complaint has nothing to do with the rationality of *differentiating between working pilots and striking pilots*; to the contrary its focus is on the rationality of *the decision to settle the Continental strike rather than to make an unconditional offer to return to work*. Plaintiffs' brief makes no bones about this; in their view it is enough for them to prove that the Union "treat[ed] all of its striking members equally badly." Resp. Br. at 23. As we proceed to show, neither precedent nor principle supports this extension of the duty of fair representation.

1 (a) The Solicitor General at least tacitly concedes that the seminal fair representation case, *Steele v. L&N.R. Co.*, 323 U.S. 192 (1944), states a unitary representational duty that rests on a duty of loyalty. As the Solicitor General acknowledges, *Steele* reasons "that 'the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf.'" U.S. Br. at 12, quoting *Steele*, 323 U.S. at 202. Indeed, as we noted in our opening brief, *Steele* "hold[s]" that a union has a representational duty to "*exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.*" 323 U.S. at 202-03 (emphasis added).

(b) The Solicitor General contends, however, that *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), *sub silentio*, expands the fair representation law by adding a "duty of care." This reading of *Ford Motor* rests on the statement that "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." 345 U.S. at 337-38. According to the Solicitor General

the quoted passage is . . . understood as recognizing two distinct branches of the duty of fair representation: the duty to avoid conduct that falls outside a

"wide range of reasonableness," and the duty to avoid conduct that is not performed in "good faith and honesty of purpose." [U.S. Br. at 17]

This, we submit, misreads *Ford Motor*. The Court's opinion there first sets out the governing legal standard in the following terms:

The statutory obligation to represent all members of an appropriate unit requires [unions] to make an *honest effort to serve the interests of all of those members, without hostility to any. . . .* The bargaining representative . . . is responsible to, and owes complete loyalty to, the interests of all whom it represents. [345 U.S. at 337-38 (emphasis added).]

The Court then went on to consider whether the union in that case had breached its duty of "*complete loyalty*" by entering into a collective bargaining agreement which, by granting seniority credit for military service, advantaged returning or newly-hired veterans as a class over non-veteran employees as a class.

The passage from *Ford Motor* on which the Solicitor General relies states the essence of the Court's response to this question; in fuller context what the Court said was

Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose. [345 U.S. at 337-38]

Based on this reasoning, the Court concluded that the union "had authority to accept" the collective bargaining provisions at issue because the "provisions before us are within reasonable bounds of relevancy." *Id.* at 342-43.

Fairly read, then, the passage on which the Solicitor General relies is a passage elaborating on the duty of "complete loyalty." What *Ford Motor* teaches is that

unions are to be afforded a "wide range of reasonableness" in drawing distinctions among bargaining unit employees—and among classes of employees—and that distinctions that are within "reasonable bounds of relevancy" are to be respected. Put differently, *Ford Motor* states the test for determining whether such a distinction is legitimate or "irrelevant and invidious," *Steele*, 323 U.S. at 203.

Ford Motor does not suggest that where the union draws a legitimate distinction between classes of employees, the substance of each group's terms and conditions of employment is to be evaluated and that unions must defend the rationality of the substance of their negotiating judgments. It is of the essence that *Ford Motor* treats with the question of whether unions may negotiate an agreement advantaging veterans as a class (and disadvantaging non-veterans) and not with the question of whether the union did too much for veterans (and too little for non-veterans). Once the *Ford Motor* Court was satisfied that the answer to the first of these questions was "yes" the Court's inquiry was at an end.

(c) Nor, contrary to the Solicitor General, can a duty of adequate representation be derived from this Court's condemnation of "arbitrary discrimination" in *Humphrey v. Moore*, 375 U.S. 335, 350 (1964), and of "arbitrary conduct" in *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). As we showed in our opening brief (at 23-24), those opinions use the phrase "arbitrary discrimination" and "arbitrary conduct" to refer to union conduct that singles out some members of a bargaining unit for disfavored treatment based upon "wholly [ir]relevant considerations," *Humphrey*, 375 U.S. at 350. *Humphrey* and *Vaca* thus further refine upon the duty of loyalty stated in *Steele* and *Ford Motor* and do not articulate a distinct "duty of care."

(d) Finally, it is noteworthy that in arguing that the duty of fair representation encompasses a "duty of care," the Solicitor General makes no attempt to treat with

Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971). This silence with regard to *Lockridge*—which postdates the cases on which the Solicitor General relies—is pregnant with significance. And plaintiffs' attempt to dismiss *Lockridge's* fair representation discussion as "dictum," Resp. Br. at 21, n.22, is simply wrong: the Court in *Lockridge* ordered the dismissal of the complaint in that case; the statement that the duty of fair representation "carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives," 403 U.S. at 301, is the basis for the Court's ruling that the plaintiff there could not proceed on a fair representation theory.²

2. Plaintiffs and the Solicitor General fare no better in their attempt to justify a duty of adequate representation as a matter of principle.

(a) Plaintiffs contend that such a duty is needed as a matter of policy to "ensure that [unions] do not abuse the trust placed in them." Resp. Br. at 19. The Solicitor General claims the duty is needed to reach a union which has "failed to fulfill its representation function." U.S. Br. at 20.

But the very point of the existing duty of fair representation is to prevent "abuses of trust," and that duty is fully adequate to the task. The office of the proposed duty of adequate representation is quite different: to address representation that is undertaken in honest good faith but allegedly falls short in securing benefits for the represented employees. And the Solicitor General completely begs the question by asserting that a union which has loyally but ineptly sought to further the interests of

² Plaintiffs are also wrong in asserting that "the Court has never cited *Lockridge* as the proper standard of conduct in any duty of fair representation case." Resp. Br. at 21 n.22. Just last Term, in *Breining v. Sheet Metal Workers*, — U.S. —, 110 S.Ct. 424 (1989), the Court relied extensively on *Lockridge*. See 110 S.Ct. at 432, quoted in Pet. Br. at 22 n.10.

those the union represents has somehow "failed to fulfill its representation function."

(b) Plaintiffs—with a hint of support from the Solicitor General, *see* U.S. Br. at 20—argue that "[i]rrational acts are often powerful evidence that a union's conduct is motivated by discrimination or bad faith" and that to "foreclose juries from examining the evidence and drawing the appropriate inferences in such cases is to virtually guarantee that such union conduct will never be remedied." Resp. Br. at 23-24. But we do not suggest for a moment that, in determining whether a union has breached its duty of loyalty, the courts should require "smoking guns," Resp. Br. at 23, should "ignore irrationality," *id.*, or should be "foreclose[d] . . . from . . . drawing the appropriate inferences," *id.*

Our point is that, where the trial court has combed the summary judgment record and is persuaded, on the basis of all the evidence, that the union has *not* breached the duty of loyalty owed to all members of the bargaining unit, there is no room for a further judicial inquiry into the wisdom—or lack of wisdom—of decisions made by the union in seeking to advance the interests of those the union represents. Plaintiffs fail to offer any justification for such an inquiry.

(c) Plaintiffs and the Solicitor General rely heavily on analogies to other areas of the law, including trust law, agency law, and corporate law, to support their contention that the duty of fair representation encompasses a "duty of care." *See* Resp. Br. at 22-23; U.S. Br. at 12-13. That method of approach does not withstand scrutiny.

There are, to be sure, obvious similarities between the common-law relationships invoked by plaintiffs and the Solicitor General, and the statutory relationship between an exclusive representative and the members of the bargaining unit the union represents. But there are, as well, obvious *differences*: unlike the agent, trustee, or corporate officer, the union alone, as *Steele* recognizes, "is clothe[d] . . . with powers comparable to those possessed

by a legislative body both to create and restrict the rights of those for whom it legislates." 323 U.S. at 198. Because unions are empowered to exercise such a broad, discretionary authority—and to make political choices that profoundly affect the working lives of those the unions represent—a judicially-enforced duty of adequate representation would be *different in kind* from a similar duty in another context.

It is, thus, very much to the point that this case does *not* arise under the federal common law but under a specific piece of federal legislation, the Railway Labor Act. This Court's task is to interpret that quite specific enactment: The relevant question here, then, is not, as the Solicitor General suggests, what duties "the law" imposes on "one who performs a representative function," but rather what duties *the RLA* imposes on unions that assume the function of an exclusive representative under that statute. *Cf. Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 386-90 (1969).

Significantly, there is nothing in the brief of either plaintiffs or the Solicitor General that squarely confronts—much less answers—that question. Neither brief points to anything in the RLA's statutory language, history or policies to support the contention that Congress sought to regulate the quality of—in addition to the honesty of purpose of—union representation or to impose a judicially-enforceable "duty of care" on unions.

Indeed, the opposing briefs end up confirming our showing, Pet. Br. at 26-32, that the exercise of such a judicial power would be *antithetical to the premises of the collective bargaining system* established by the RLA (and the National Labor Relations Act, as amended). When all is said and done, what those briefs call for is a review of the *substance* of the bargain the Union struck here to determine whether that bargain is in some sense sound or adequate. U.S. Br. 13, n.21; Resp. Br. 15-16.

As we showed in our opening brief, subjecting collective bargaining agreements to such review would be *di-*

rectly contrary to the national labor policy. For that policy provides for private, rather than public, ordering of employment relations and does not allow for "government regulation of the terms and conditions of employment." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970). The words of *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 219 (1979), bear quoting again: "If the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution."

3. Finally, it is worth noting that the briefs of the plaintiffs and the Solicitor General confirm our contention that, in this unique context, there would be insurmountable practical difficulties in formulating—and in applying—a principled duty of adequate representation.

(a) In other contexts a duty of care is defined and enforced by measuring a defendant's conduct against the hypothesized conduct of a reasonably prudent person. Just last Term, however, this Court ruled that this is not an appropriate standard to apply in the fair representation context. *Steelworkers v. Rawson*, — U.S. —, 110 S.Ct. 1904 (1990). Thus, if a duty of adequate representation is to be imposed as part of the duty of fair representation, a novel standard would have to be invented by the courts—without any legislative guidance—to give content to that duty.

Plaintiffs turn to the dictionary, *see* Resp. Br. at 22 n.23, and the Solicitor General to the casebooks, *see* U.S. Br. at 16-17, in a search for such content. Using the dictionary definition of "arbitrary," plaintiffs suggest that while a union is not to be held to a reasonable person standard, the union is subject to liability if a jury finds that the union took action which was "not done . . . according to reason or judgment." And the Solicitor General posits that liability is not to turn on whether the union acted as a reasonable person but on whether the union exceeded its allowed "wide range of reasonableness."

Both "standards" are so general and so uninformative as to fail completely in providing guidance for the correct decision of concrete cases.

(b) The cardinal importance of such guidance—and the enormous risk to a sound labor relations system posed by a vague standard of care—is confirmed by the Solicitor General's brief. That brief carefully explains that in negotiating agreements such as the one at issue here, the union is charged with the

critical function of accommodating conflicting interests among unit members, who often will share unequally in the duties and obligations the union is able to attain from the employer. Moreover, a union must be able to seize fleeting opportunities for reaching agreement and to respond quickly to management initiatives. And a union must act within constraints imposed by deadlines and scarce resources that can limit its ability to devote extensive study, investigation, and analysis to each action it takes. Finally, a union's decisionmaking—particularly during a strike—must be guided by essentially unverifiable assessments of whether the economic power it can wield will be sufficient to attain its objectives. [U.S. Br. at 17-18]

Against this background, the Solicitor General argues that the governing standard defining the duty of care "should be applied with keen sensitivity to the situation confronting the union at the time it acted," U.S. Br. at 19, and that it is of the essence that "judicial inquiry proceeds *ex ante* from the standpoint of the decisionmaker at the time of decision, and takes into account the constraints of time, limited information and limited resources under which the decisionmaker was operating," *id.* at 19-20.

While the compensating cautions suggested are all well and good, these are heroic demands to make of a legal system in which the working reality is that a decision as to whether a union breached its duty is necessarily made *post hoc* by persons—including, most significantly, lay jurors, *see Chauffeurs Local No. 391 v. Terry*, —

U.S. —, 110 S.Ct. 1339 (1990)—who are wholly outside the ongoing labor relations system.

A legal rule that demands of lay jurors such “keen sensitivity” to subtle situational nuance is a rule all too often doomed to fail. And it is this substantial likelihood of failure that unions will have to take into account in negotiating—and in administering—collective bargaining agreements. The defensive collective bargaining that will result will, we submit, do far more to restrict employee rights and interests than adding a “duty of care” to the present “duty of loyalty” could possibly do to expand those rights and interests. As the Court said in *Humphrey v. Moore*, 375 U.S. at 349-350: “Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.”³

II. THE SUMMARY JUDGMENT ISSUES

A. We demonstrated in our opening brief that ALPA’s decision to settle the Continental strike was lawful under any interpretation of the duty of fair representation, including the interpretation adopted by the court of appeals in this case. Pet. Br. at 39-50. In response, plaintiffs all but abandon the Fifth Circuit’s holding that a jury is entitled to decide that ALPA breached the duty of fair representation by “irrationally” agreeing to a strike settlement which was less favorable to the striking

³ As we have emphasized throughout, see Pet. Br. 28-31, 34-36, the dangers to a well-functioning labor relations system posed by an undifferentiated “duty of care” are most acute with regard to the complex and delicate task of negotiating collective bargaining agreements—and strike settlement agreements—that set out the continuing rules that govern the parties into the future. The portions of the Solicitor General’s brief just quoted in the text confirm that point. Thus, while we urge that the correct standard in all fair representation contexts is one of honesty and good faith, we urge, too, that, at a minimum, such a standard is essential in the negotiation context. See *Thomas v. United Parcel Service*, 890 F.2d 909 (7th Cir. 1989).

pilots than an unconditional offer to return to work. Instead, plaintiffs put their reliance on the argument that the record shows that ALPA must have known that the strike settlement was inadequate and that such a showing makes out a breach of the duty of fair representation. Resp. Br. 29-32. The record contains no support for that argument.

Plaintiffs discuss at more length in Part III of their brief the court of appeals’ alternative holding that the strike settlement provisions embodied in the order and award that governed the striking pilots’ opportunities to return to work after the strike constitute unlawful discrimination. In this regard, plaintiffs continue to ignore this Court’s conclusion in *TWA v. IFFA*, — U.S. —, 109 S.Ct. 1225, 1231-32 (1989) that the RLA does *not* prohibit the post-strike continuation of job assignments conferred upon permanent replacements during a strike.

1. The order and award provided benefits to the strikers with a level of certainty and enforceability that could not have been obtained through an unconditional offer to return to work.⁴ ALPA was, moreover, faced with a number of circumstances in August, September, and Octo-

⁴ The order and award provided almost immediate recall in seniority order to seventy captain positions covered by the 85-5 bid, guaranteed the pay of pilots who were not recalled to captain positions in keeping with an agreed schedule, guaranteed full restoration of seniority rights as qualified pilots were returned to their pre-strike positions, provided a judicial enforcement mechanism, waived Continental’s right to refuse reinstatement to any pilot who had obtained substantially equivalent employment elsewhere, and obtained the right of pilots who did not wish to return to Continental to receive \$4,000 of severance pay per year of employment at Continental (\$2000 for pilots furloughed before the strike). None of these opportunities would have been available under an unconditional offer to return. Also, and contrary to plaintiffs’ assertion, Option 1 pilots were not required “to exercise a waiver of all claims against Continental.” Resp. Br. 12. Those pilots were entitled to recover on claims for pre-petition wages, pre-petition medical claims, unused vacation and pre-petition reimbursable expenses. J.A. 27.

ber 1985 that made a negotiated resolution of the strike the best option.⁵

Contrary to plaintiffs' assertions (Resp. Br. 29), the record makes it clear that the ALPA negotiators were motivated by these circumstances—all of which were undisputed and all of which created legal uncertainties with which the Union had to come to grips—to pursue a negotiated resolution which guaranteed as many jobs as possible, with full protection of seniority rights after the strikers returned to work. See, R. 131, Higgins Affidavit ¶¶ 7-8; Henderson Dep. at 171-76, 190-91, 460; Schnell Dep. at 903-905, 1144-46, 1453-54, 1829-45, 1965-66; Lappin Dep. at 368-71, 386-87, 598-99, 606-07, 663. The record establishes, as well, that ALPA sought in particular to negotiate for maximum seniority protection for the striking pilots on a return to work (Schnell Dep. at 849, 893-94), and that in response Continental's negotiators took the position that the 85-5 bid positions were legally filled and no longer available for returning strikers (Gallagher Dep. at 208-10; Schnell Dep. at 888, 1848).⁶

The record in the district court established that the ALPA negotiators concluded that they had secured from

⁵ At that time, the strike had lasted two years with little economic effect on Continental, the number of permanent replacements exceeded the strikers, the collective bargaining agreement had been abrogated with court approval, Continental had withdrawn its recognition of ALPA, and Continental was acting to fill all of its vacancies in a manner intended to prevent any striking pilots from returning to work for years to come.

⁶ Plaintiffs argue that ALPA has relied upon deposition testimony which is not part of the record. Resp. Br. at 29 n.28. This argument was made in their Motion to Strike Record References contained in ALPA's Petition for Rehearing to the Fifth Circuit. That motion was denied by the Fifth Circuit by order dated December 27, 1989, holding that "this material is in the record." No further review of that decision was sought. Plaintiffs' companion assertion that ALPA did not even argue to the district court that the Union had fulfilled its duty of fair representation to the striking pilots (Resp. Br. 5 n.7 and 29 n.28) is equally frivolous. See R. 132 at 47-48; R. 151 at 7-8, and R. 165 at 18, 24-27.

Continental all the concessions that the company was prepared to make, achieving a back-to-work agreement that contained benefits otherwise unavailable, including many of the 85-5 bid positions previously awarded to non-striking pilots. See, e.g. Henderson Dep. at 195-96; Higgins Dep. at 885-86; Schnell Dep. at 1051; Lappin Dep. at 598-607. All of these facts, presented to the district court on a full summary judgment record, led that court to conclude that the settlement was "the best deal that the Union thought it could construct. . . ." J.A. 74.

The court of appeals did *not* disturb the district court's conclusion in this regard. The Fifth Circuit instead reasoned that ALPA's best efforts could be judged "irrational" on the grounds that strikers would have been entitled to greater benefits by unconditionally returning to work and litigating their statutory recall rights. J.A. 89-92. As the Solicitor General points out, the court of appeals' analysis of the governing law is fatally flawed (U.S. Br. 21-26), and plaintiffs offer no serious defense of the Fifth Circuit's application of its duty of fair representation theory to this case.

The record below establishes that the negotiators' concerns about an unconditional offer to return to work were entirely justified: Continental had abrogated the collective bargaining agreement (with its assurances of seniority), withdrawn its recognition of ALPA, and sued to void the strikers' bids under the 85-5 vacancy bid. Continental's intransigence promised uncertainty and litigation at every turn if an unconditional return to work had been made without a back-to-work agreement enforceable in the bankruptcy court. ALPA's concern about the state of the law at the time was not irrational or arbitrary under any standard.⁷

⁷ In our opening brief, we demonstrated that the law regarding recall rights in the circumstances existing in October, 1985 was uncertain at best. Pet. Br. 41-50. We add only that, contrary to plaintiffs' assertions, Resp. Br. at 30, ALPA's counsel in the *ALPA v. United Air Lines* case did warn the negotiators that the law was uncertain at the time, and that they could not be sure that the

2. Plaintiffs' argument that the order and award constitutes unlawful discrimination against the striking pilots is no stronger. Some 218 new captain positions and over 200 first officer positions had been awarded to working pilots through the 85-5 vacancy bid, and Continental continued to hire permanent replacement pilots to fill entry level second officer positions. Continental also refused to accept 85-5 bids from striking pilots, claiming that the bids were fraudulent and refused to recognize ALPA.

Against this background, ALPA sought a means to gain job rights for the strikers. The Union succeeded in

ALPA v. United decision, which involved very different facts, would be of any help if litigation with Continental followed. Schnell Dep. at 1839-45.

Plaintiffs seize on the deposition testimony of another of ALPA's attorneys in an attempt to create the impression that ALPA's negotiators should not have concluded that their rights under an unconditional offer to return to work were less than certain. Resp. Br. 8, 9, 30. The testimony does not support that assertion. Instead, ALPA's attorney testified that despite any indication to an ALPA representative that Continental would permit pilots to return in seniority order in an unconditional return, R. 163 Att. 3.5 at 166-69, he warned the negotiators that "Lorenzo might play games" with the normal rules under an unconditional offer to return to work, *id.* at 160-61, and that Continental might not recognize an unconditional offer to return to work because Continental no longer recognized ALPA as the pilots' bargaining representative. *Id.* at 161-2.

Throughout their discussion of the recall issue, moreover, plaintiffs artfully confuse two distinct recall issues—the right of striking pilots *rel non* to pilot positions at the conclusion of a strike (including the 85-5 bid positions awarded to permanent replacements), and the method governing the order of recall to those pilot vacancies that are available to strikers at the end of the strike. Plaintiffs' only claim is that an ALPA attorney believed that Continental would employ seniority as the governing principle for recalling strikers to vacant or available pilot positions after the strike. Plaintiffs do not (and cannot) claim that anyone advised ALPA that Continental planned to rescind its award of the 85-5 bid positions to permanent replacements in order to create pilot vacancies for strikers in an unconditional return to work. In fact, it is undisputed that Continental's intent was to refuse to award any of the 85-5 bid positions to striking pilots at the end of the strike. Continental Br. 21 n.22.

negotiating for an arrangement whereby a significant number of positions that had previously been awarded to permanent replacements were awarded to striking pilots. To obtain that benefit, ALPA agreed to a job allocation mechanism that, for a brief transitional period after the strike, limited the available vacancies for which returning strikers could bid. Although some individual working and striking pilots ended up in different positions from those they would have occupied had the 85-5 bid positions been awarded entirely to one group or the other, the result plainly compromised the working pilots' claims to all of the 85-5 bid positions, as well as the striking pilots' uncertain claims. Plaintiffs state that this aspect of the order and award permitted Continental to treat former strikers and permanent replacements "differently" in some respects. Resp. Br. 40-44. Yet they offer no rationale, as they must under *Steele*, for concluding that the tradeoffs ALPA made in bargaining to obtain a portion of the 85-5 bid positions for strikers were based on irrelevant or invidious considerations or somehow imply that ALPA was bent on harming strikers and favoring strike replacements.

Nothing in that compromise solution is contrary to this Court's holding in *NLRB v. Erie Resistor*, 373 U.S. 221 (1963). In *Erie Resistor*, the employer unilaterally granted 20 years of seniority to all non-strikers as permanent protection from future layoffs thereby putting before the Court a practice that created a "cleavage in the plant continuing long after the strike is ended" that "with each subsequent layoff . . . stands as an ever-present reminder of the dangers connected with striking and with union activities in general." *Id.* at 231.

In contrast, the order and award did *not* affect seniority for purposes other than the allocation of the 85-5 bid positions and of future captain positions for a brief transitional period at the end of the strike; such matters as future layoff and recall procedures, employee benefits, and the like, were *not* affected. The fact that normal seniority rules prevailed in these other respects demon-

strates that, in contrast to the employer's conduct in *Erie Resistor*, ALPA's conduct here was designed to enhance the strikers' seniority rights. As such, the provisions of the order and award cannot be viewed as the kind of interference with the exercise of the right to strike condemned in *Erie Resistor*, much less as the hostile or invidious discrimination condemned in *Steele*.

B. Plaintiffs also seek to show that, even if the law was uncertain and Continental was intransigent, ALPA still breached the duty of fair representation through other "misconduct." Resp. Br. 32-39. All of their arguments along this line were rejected by the district court which found that there was no evidence of misconduct, J.A. 74, 75; a finding that was *not* disturbed by the court of appeals.

1. ALPA did not exceed its authority by resolving the strike through a negotiated order and award of the bankruptcy court. Resp. Br. 33. The district court held that the governing union documents conferred "a plenary binding general agency" on the negotiators to reach an agreement without ratification. J.A. 74-75. The Fifth Circuit affirmed this holding in concluding "that the union members had no right to approve the settlement embodied in the order and award." J.A. 97. Because plaintiffs did not file their own petition for *certiorari*, that holding is final and binding.⁸

Plaintiffs also claim that ALPA had made promises of membership ratification to some pilots during the strike but failed to keep those promises. Resp. Br. 33. This allegation is found, however, only in Count IV of the amended complaint (J.A. 55), which was dismissed by the district court, and never appealed to the Fifth Circuit.

Plaintiffs continue to argue that the MEC should also have been given the opportunity to ratify the order and

⁸ Arguments made by plaintiffs now (Resp. Br. 3, 35), that there was a 1983 MEC resolution passed prior to the strike requiring ratification of any concessions made to Continental were specifically and at length rejected by the court of appeals. J.A. 95-96.

award. Resp. Br. 33. Again, the district court's conclusion that ALPA's governing documents fully authorized the negotiators to do exactly what they did (J.A. 74-75), is fully supported by the record. It is undisputed that (a) the ALPA Constitution left to the discretion of the MEC whether MEC ratification would be necessary (R. 131 Higgins Aff. ¶ 13 and Exh. G); and (b) the last MEC resolution addressed to the issue of ratification was adopted on August 24, 1984 and provided that the negotiating committee was authorized "to conclude a strike settlement as a product of negotiations and/or the use of a third party process, *without ratification*," (R. 131, Higgins Aff. ¶ 15 and Exh. I (emphasis added)). MEC ratification simply was not required. Higgins Dep. at 1004, 1019; Schnell Dep. at 1348, 1997; Henderson Dep. at 400; Lappin Dep. at 409-10, 560.⁹

In light of this summary judgment record, the court of appeals had no basis for "accepting for these purposes the pilots' interpretation of the union policy" J.A. 96 n.4. See *Newell v. Int'l Bhd. of Elec. Workers*, 789 F.2d 1186, 1189 (5th Cir. 1986) (union's interpretation of its own constitution and policy guidelines must be accepted by the court unless "patently unreasonable").

2. ALPA did not try to disguise the negotiated order and award. Cf. Resp. Br. 34. Continental was "an indisputably . . . hostile, intransigent employer" (J.A. 75),

⁹ Plaintiffs allege that a resolution passed at the September 1985 MEC meeting limited the negotiators' authority. Resp. Br. 7. First, the language of the resolution did not contain any such limitation ("settlement of outstanding issues [to] be pursued under the direction of the MEC officers and Negotiating Committee Chairman"). Second, nothing in that resolution limited the authority granted in the August 1984 resolution quoted in the text, a resolution that expressly authorized a strike settlement without ratification. Third, the negotiators each testified that they had authority to conclude a settlement without MEC approval. Higgins Dep. at 1004, 1007, 1019; Schnell Dep. at 1348, 1997; Henderson Dep. at 400 and Lappin Dep. at 409-10, 560. Finally, the two contrary affidavits relied upon by plaintiffs were nothing more than inadmissible conclusory "understandings." R. 149, Ex. 67, Ex. 48.

that did not recognize ALPA as the pilots' bargaining representative. The order and award gave the negotiators the critical comfort of an enforcement mechanism in the bankruptcy court. There was no desire to disguise anything. The Union sought an order and award and that is what the Union obtained. Schnell Dep. at 1610-11; Higgins Dep. at 842.

3. ALPA did not defeat union democratic process by placing the MEC in custodianship. Cf. Resp. Br. 35-37. If the majority of a bargaining unit believes that their union has not been effective, they can select a new union to represent them; putting the MEC into custodianship, in order to have a formal entity which could represent the pilots' interests under the order and award, had *no* effect on the bargaining unit's ability to use this democratic process to "throw the rascals out."

In any event, plaintiffs' claim that ALPA improperly imposed a custodianship *after* the Union concluded the order and award is irrelevant to whether ALPA breached its duty of fair representation by entering into the order and award. Plaintiffs' duty of fair representation claim concerns ALPA's conduct in reaching the strike settlement, *not* the Union's conduct affecting plaintiffs' right to vote for a particular candidate in ALPA's national election. Plaintiffs recognized as much when they alleged that the custodianship deprived them of their voting rights only in Count III of their complaint (J.A. 54-55), alleging a breach of fiduciary duty under the Landrum-Griffin Act, 29 U.S.C. § 501, and not in Count I alleging a breach of the duty of fair representation. Count III was dismissed by the district court and plaintiffs never appealed that dismissal.¹⁰

¹⁰ Plaintiffs imply that the negotiators' judgment was affected by President Duffy's promises of high-paying employment by the custodian group. Resp. Br. 15 n.19. In fact, however, the testimony was undisputed that the custodianship positions were discussed only *after* the entry of the order and award on October 31, 1985. Schnell Dep. at 1763-64; Lappin Dep. at 634, 761; Henderson Dep. at 84-86; Higgins Dep. at 66, 112-13.

4. Nor did ALPA breach its duty because pilots who retired or resigned during the strike were excluded from the agreement. Resp. Br. 3-4, 37 n.34. Once those pilots retired or resigned, they were no longer members of the bargaining unit. And "[s]ince retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations with the employer." *Allied Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 181 n.20 (1971). Moreover, at every opportunity, strikers were warned that, although ALPA had every intention of trying to include in a settlement pilots who retired or resigned, their legal status was very uncertain, and that retirement or resignation most likely meant they would not be included in a settlement. Higgins Dep. at 622, 630-31; Henderson Dep. at 698-99; Lappin Dep. at 741-42.¹¹

5. Based on nothing more than vague allegations that the strike had become an "obvious blemish" on ALPA President Duffy's record (Resp. Br. 38-39), plaintiffs assert they have adduced sufficient evidence of hostility to create issues of fact as to ALPA's motive and intent in negotiating a settlement rather than simply concluding the strike with a return to work. Viewed in their most favorable light, such conclusory assertions are insufficient to reverse the finding by the district court that there was no evidence of "personal animosity or illegal motives against these pilots" (J.A. 76), a finding left undisturbed by the court of appeals.

In cases where the defendant's state of mind is at issue, as in other cases, a plaintiff opposing summary judgment "may not rest upon mere allegation . . . but must set forth

¹¹ Against this undisputed deposition testimony the plaintiffs have cited part of a letter to one pilot written by President Duffy in September 1985, expressing ALPA's "intention to represent all CAL pilots." Resp. Br. 4 n.5. The letter makes clear, however, that pilots risked losing their rights by retiring. Thus, the letter states that Continental "has taken a very rigid position against pilots who have already retired," and that "[i]t is one thorny issue that will be difficult to settle. . . ." R. 149 Ex. 91.1.

specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Asserting that the strike was an "obvious blemish on Duffy's record as ALPA president and a threat to his reelection" (Resp. Br. 38), without even a record citation, cannot support a nonspeculative inference of bad faith, particularly in the face of a summary judgment record that establishes that President Duffy offered his uncompromising support to the strike and the Continental MEC. Henderson Dep. at 481-83; Lappin Dep. at 653-656; Higgins Dep. at 959-60.¹²

C. To defeat a motion for summary judgment, the non-moving party must do more than show "some metaphysical doubt as to the material facts." *Matsushita Electric Indus. v. Zenith Radio Corp.*, 475 U.S. 575, 586 (1986). Once ALPA carried its "initial responsibility" of identifying those portions of the summary judgment record demonstrating "the absence of a genuine issue of material fact," *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), the plaintiffs, as the party opposing summary judgment, had to make a showing "sufficient to establish the existence of [each] element essential to that party's case, and on which [they would] bear the burden of proof at trial, *id.* at 322. Plaintiffs failed completely to meet their burden under FRCP Rule 56.

CONCLUSION

For the reasons stated in petitioner's opening brief and above, the decision below should be reversed and remanded with instructions to reinstate summary judgment for the petitioner.

¹² Similarly, the fact that the order and award required the dismissal of eighteen pieces of litigation between ALPA and Continental, including a libel action in Australia against Chairman Higgins and a television station, does not raise "a further issue of personal gain and bad faith," as plaintiffs assert. Resp. Br. 39 n.36. Such speculation is insufficient to defeat summary judgment (*Matsushita Electric Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 596-97 (1986)), and is unsupported by the record (Higgins Dep. at 757-64).

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1990

**AIR LINE PILOTS ASSOCIATION
INTERNATIONAL, PETITIONER**

v.

JOSEPH E. O'NEILL, ET AL.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING PETITIONER**

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QUESTION PRESENTED

Whether petitioner breached its duty of fair representation by negotiating a back-to-work agreement that ended a strike by pilots against Continental Air Lines and allocated positions between returning strikers and pilots who worked during the strike.

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In the Supreme Court of the United States

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v.

JOSEPH E. O'NEILL, ET AL.

*ON WRIT OF CERTIORARI
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FOR THE FIFTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING PETITIONER**

INTEREST OF THE UNITED STATES

This case involves the scope of a union's duty of fair representation in negotiating an agreement to end a labor dispute. Resolution of this case may affect the ability of unions to function as collective bargaining representatives and to avoid or terminate potentially damaging labor disputes in interstate transportation industries.

The National Mediation Board has responsibility under the Railway Labor Act, 45 U.S.C. 151 *et seq.*, to mediate labor disputes in the rail and airline industries. The federal government therefore has a specific interest in the law affecting the settlement of such disputes, in addition to its general interest, arising from the Commerce Clause, in the uninterrupted functioning of the nation's interstate transportation network.

Although this case arises in the context of the Railway Labor Act, the duty of fair representation also applies to employees represented by unions acting under the National Labor Relations Act, 29 U.S.C. 151 *et seq.* The National Labor Relations Board has primary responsibility for administering that Act, including the determination of whether alleged breaches of a union's duty of fair representation constitute unfair labor practices. See *Breininger v. Sheet Metal Workers Int'l Ass'n*, 110 S. Ct. 424, 429 (1989).

In response to the Court's invitation at the petition stage in this case, the Solicitor General filed a brief expressing the views of the United States.

STATEMENT

1. Since the 1940s, petitioner has represented Continental Air Lines pilots in collective bargaining with the airline. In 1983, after filing a petition for reorganization under Chapter 11 of the Bankruptcy Code, Continental repudiated its collective bargaining agreements with petitioner and other employee unions and unilaterally imposed "emergency work rules" that cut pilots' salaries and benefits by more than fifty percent. In response, petitioner initiated a strike against Continental. Pet. App. B2.¹

For the next two years, Continental employed permanent replacements and cross-over strikers as pilots. During that period, the bankruptcy court upheld the airline's rejection of its collective bargaining agreement with petitioner and ordered the parties to engage in collective bargaining. No new agreement was reached, and, by August 1985, working pilots outnumbered strikers by 1,600 to 1,000. At

¹ There are four separately paginated appendices to the petition, numbered 1 through 4. To simplify citations, we will cite to them as though they had been denominated A through D.

that time, Continental gave notice that it would no longer recognize petitioner as the pilots' bargaining representative. Pet. App. B2-B3.²

On September 9, 1985, Continental posted its Supplementary Base Vacancy Bid 1985-5 (85-5 bid) covering some 441 anticipated vacancies for captains and first officers and an undetermined number of second officer vacancies. Pilots interested in those vacancies were invited to submit bids by September 18, 1985, specifying their preferred position, base of operations, and aircraft. In accordance with Continental's customary practice, the positions were to be awarded on the basis of seniority. In order to allow for necessary training, the 85-5 bid was posted substantially in advance of the date when pilots were expected actually to assume the positions covered by the bid. Pet. App. B3-B4.

Fearing that the 85-5 bid would fill all expected jobs for some time in the future, the Continental Master Executive Council (MEC)—a committee that served, subject to the authority of petitioner's executive board and board of directors, as the coordinating council for Continental pilots—authorized strikers to submit bids, and several hundred did so. Continental challenged the strikers' bids in court, and ultimately announced that it had "awarded" the 85-5 bid positions to working pilots. However, at the time the strike ended, on October 31, 1985, none of the individuals assigned positions under the 85-5 bid had actually begun to work in the positions assigned. Pet. App. B3-B4; see Pet. 4; Br. in Opp. 3.

² The Court considered the validity of such withdrawals of recognition last Term in *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542 (1990), (affirming an NLRB decision that an employer could not defend a withdrawal of union recognition by presuming that replacement workers hired during a strike oppose continued representation by the union).

In late September 1985, the MEC voted not to return to work, but also authorized its officers and a negotiator to pursue a settlement with Continental. Pet. App. B4. See Pet. C.A. Br. 8; Resp. C.A. Br. 9. During October 1985, representatives of petitioner and Continental agreed to terms for ending the strike and resolving litigation involving Continental, petitioner, and individual pilots. On October 31, 1985, the bankruptcy court entered an order and award embodying the parties' agreement. Pet. App. D. Petitioner consented to entry of the order and award without providing notice to the striking pilots or the MEC or submitting the agreement for ratification. Pet. App. B4.

Under the order and award, each striker was entitled to select one of three options. Strikers electing Option 1, the most important for present purposes, waived claims against Continental and obtained the right to be reinstated in certain positions on the basis of seniority. The agreement allocated the first 100 captain positions in the 85-5 bid to working pilots. The next 70 captain positions (the remainder covered by the 85-5 bid) were earmarked for returning strikers; however, unlike working pilots, strikers were obligated to accept the base and aircraft type assigned by Continental. The agreement further provided that until October 1, 1988, subsequent vacancies for captain positions would be allocated among working pilots and returning strikers on a one-to-one ratio. Again, whereas working pilots could bid for the base and aircraft type they preferred, returning strikers were required to accept management's choice of base and aircraft. The issue of how vacancies occurring after October 1, 1988, were to be allocated among working pilots and returning strikers was submitted to binding arbitration. Pet. App. B4-B5, D6-D8.

The effect of these provisions was to allocate to returning strikers some of the 85-5 bid positions that, according to Continental, had been awarded to working pilots. At the same time, the agreement guaranteed working pilots more desirable positions than they could have attained if

all 85-5 bid positions and subsequent vacancies had been assigned to working pilots and returning strikers on the basis of seniority alone. It was foreseeable that the effects of placing working pilots in those positions would persist, since (in the absence of a layoff) pilots could not be displaced from positions they occupied. See Pet. App. B5.³

2. Respondents have been certified as representatives of a class of Continental pilots who remained off the job until the end of the strike. In their complaint, respondents alleged that petitioner breached its duty of fair representation in negotiating and consenting to the order and award. The complaint also asserted that petitioner's failure to submit the agreement for ratification was a violation of Section 101(a)(1) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 411(a)(1), and advanced two additional causes of action, which were not pressed on appeal. The district court granted summary judgment in petitioner's favor on all claims. See Pet. App. C.

3. The court of appeals reversed with respect to respondents' fair representation claim. Quoting from this Court's decision in *Vaca v. Sipes*, 386 U.S. 171, 177, 190 (1967), the panel stated that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Pet. App. B9. Because *Vaca* "recognizes three distinct standards of conduct," the court continued, "a breach of the duty of fair representation does not require that a union's conduct be taken in bad faith or with hostile discrimination, but may rest upon the arbitrariness or irrationality of the union's acts." *Id.* at B9-B10. Adhering to standards it had announced in *Tedford v. Peabody Coal Co.*, 533 F.2d 952, 957 (5th Cir. 1976), the court stated that a union's decision could be considered arbitrary unless it was

³ With respect to matters other than their initial placement, returning strikers were entitled to exercise their full seniority rights upon being recalled to work. See Pet. App. D9.

(1) based upon relevant, permissible union factors which exclude[] the possibility of it being based upon motivations such as personal animosity or political favoritism; (2) *a rational result of the consideration of those factors*; and (3) inclusive of a fair and impartial consideration of the interests of all employees.

Pet. App. B10.

In this case, the court determined, a jury could find that petitioner had acted arbitrarily by agreeing to an order and award that "left the striking pilots worse off in a number of respects than complete surrender to [Continental]." Pet. App. B11. The court explained that, in its view, returning strikers would have been legally "entitled to reinstatement as vacancies occurred" (*id.* at B12); that Continental "could not have changed its policy of assigning work by seniority * * * unless it had a legitimate and substantial business justification for doing so" (*id.* at B13); and that a trier of fact could find that Continental "likely would have recognized the returning strikers' seniority rights and privileges if they had unconditionally agreed to return to work" (*id.* at B14). The court rejected petitioner's contention that the agreement benefitted returning strikers by giving them access to some of the positions encompassed by the 85-5 bid, ruling that, "under ordinary seniority rules," returning strikers would have been "entitled to fill the vacancies announced in the 85-5 bid." *Ibid.*⁴ The court concluded (*ibid.*):

⁴ In support of this conclusion, the court cited *ALPA v. United Air Lines, Inc.*, 614 F. Supp. 1020 (N.D. Ill. 1985), *aff'd in part*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987). The district court's decision in *United Air Lines* was entered on August 8, 1985, and the case was pending on appeal at the time petitioner agreed to the entry of the order and award in the bankruptcy court. The court of appeals also cited *Independent Fed'n of Flight Attendants (IFFA) v. Trans World Airlines, Inc.*, 819 F.2d 839 (8th Cir. 1987), *rev'd in part*,

A factfinder could infer that had [petitioner] unconditionally offered to return the pilots to work, the strikers would have been recalled in seniority order, and would have been able to successfully bid for [85-5 bid] vacancies and also preserve their litigation rights against [Continental].

In addition, the court of appeals held that respondents had raised a material issue of fact as to whether the order and award unjustifiably discriminated against returning strikers. "Depending upon the explanation offered by [petitioner]," the court concluded, "a factfinder might infer that the negotiated division of pilots into strikers and nonstrikers and the subsequent unfavorable discriminatory treatment of returning strikers constituted a breach of the union's duty of fair representation." Pet. App. B15.⁵

SUMMARY OF ARGUMENT

1. In *Vaca v. Sipes*, 386 U.S. at 177, this Court stated that a union's duty of fair representation encompasses a tripartite obligation to refrain from acting towards those it represents (1) with hostility or bad faith, (2) in a discriminatory manner, or (3) arbitrarily. This Court has repeatedly stated that *Vaca* applies to a union's contract negotiation, as well as contract administration, functions. When a union is chosen by a majority of the employees in a unit as the representative of the employees in that unit, federal law not only precludes the minority from choosing another representative, but also generally precludes *all* employees from bargaining with the employer as individ-

109 S. Ct. 1225 (1989), a decision issued after entry of the order and award.

⁵ The court of appeals affirmed the district court's dismissal of respondents' LMRDA claim. Pet. App. B15-B19. Respondents have not sought further review of that decision.

uals. Since these preclusive effects operate over the entire range of a union's representative functions, the represented employees deserve protection against bad faith, arbitrary, or discriminatory conduct by the union throughout that range. This result recognizes that a union, acting as exclusive representative, is subject to duties of loyalty (in the labor law context, avoidance of bad faith) and duties of care (in the labor law context, avoidance of arbitrary or discriminatory conduct) analogous to duties the law imposes on others who undertake representative or fiduciary functions.

An additional consideration suggests the need for a single standard applicable over the entire range of a union's representative functions. Contract negotiation and contract administration are not two discrete categories that exhaust a union's representational functions. Issues arising in grievance proceedings may well involve both enforcement of contractual norms for the benefit of individual employees and adjustment of rights and obligations left unclear or undetermined by the contract; grievance proceedings may thus implicate both administration and negotiation. Similarly, contract negotiations may involve not only the general division of rights and obligations between employer and employee and the allocation of such rights and obligations among employees, but also the settlement of distinctly individual problems. In short, the negotiation/administration distinction is far too blunt an instrument to distinguish those instances in which union bad faith alone constitutes a breach of the duty from those instances in which arbitrary or discriminatory conduct not undertaken in bad faith may violate the duty.

2. In applying the *Vaca* standard in any context, however, a court should accord the union a "wide range of reasonableness" to protect the union's ability effectively to represent bargaining unit members. Moreover, that standard should be applied from the standpoint of the union at the time it undertook the challenged conduct, with all of

the constraints of time, information, resources, and uncertainty in which the union was functioning. A lesser degree of deference to union decisionmaking could impair the performance of one of the collective bargaining representative's most important tasks: reconciling conflicting interests of bargaining unit members. It would also be inconsistent with the national labor policy that fosters a system of autonomous private decisionmaking by workers acting through their exclusive representative.

3. The court of appeals erred in assuming that the question raised by this case was whether the union's assessment of the potential costs and benefits of submitting an unconditional offer to return to work was, ultimately, correct. Rather, the crucial issue was whether the union's choices in negotiating the settlement with Continental, viewed from the standpoint of union leaders at the time of the negotiations, fell within a broad range of reasonableness. A union engaged in contract negotiations must have the capacity to respond quickly and flexibly to management proposals; if the price of that capacity is that unions will not incur liability on those occasions when they obtain less than they might have for those they represent, that price is a necessary consequence of federal labor policy and of the realities of industrial relations.

4. The court of appeals also erred in holding that the back-to-work agreement impermissibly discriminated against the striking pilots by creating a permanent division in the work force between strikers and non-strikers. See *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 230 (1963). The only substantial permanent effect of the agreement appears to be an effect that is plainly permissible—those who worked during the strike retained their positions despite the fact that they had less seniority than some of the full-term strikers. There is no indication that, once the recall process was completed and all strikers had returned to work, the agreement created any permanent split in the

labor force or had any further effect on the exercise of seniority rights for purposes of future reductions in force, filling future vacancies, or determination of any other employment benefits. Thus, the back-to-work agreement did not impermissibly discriminate against striking pilots.

ARGUMENT

A. CONDUCT BY A UNION TOWARD A MEMBER OF THE BARGAINING UNIT THAT IS ARBITRARY, DISCRIMINATORY, OR IN BAD FAITH MAY VIOLATE THE UNION'S DUTY OF FAIR REPRESENTATION, REGARDLESS OF WHETHER THE UNION IS ENGAGED IN CONTRACT NEGOTIATION, CONTRACT ADMINISTRATION, OR SOME OTHER REPRESENTATIVE FUNCTION

1. In *Vaca v. Sipes*, this Court summarized the origin and scope of the fair representation doctrine. The Court held:

[T]he exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

386 U.S. at 177.⁶ *Vaca* itself involved an allegation that a union's failure to pursue a meritorious grievance through arbitration, pursuant to a collective bargaining agreement, violated the union's duty of fair representation. Nonetheless, the Court expressly noted that its statement of the scope of the duty was not limited to the union's grievance processing function: the union "had a statutory duty fairly

⁶ Later in the *Vaca* opinion, the Court reiterated that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U.S. at 190.

to represent all of [the members of the bargaining unit], both in its collective bargaining * * * and in its enforcement of the resulting collective bargaining agreement." *Ibid.*

Although the Court has never been squarely presented with the question whether *Vaca*'s tripartite standard applies to the negotiation of a collective bargaining agreement, the Court since *Vaca* has continued to insist that the standard applies "during the negotiation, administration, and enforcement of collective-bargaining agreements," *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 47 (1979),⁷ or whenever a union is acting in its representative capacity, *Breininger v. Sheet Metal Workers*, 110 S. Ct. 424, 429 (1989).⁸ None of the Court's formulations has suggested any essential difference in the standards applicable to negotiating and administering collective agreements. Nor do the statutes conferring authority on unions as exclusive representatives of bargaining unit employees suggest any distinction based upon the nature of the representative function.⁹

2. The Court's repeated statements that the duty is breached by union conduct that is arbitrary or discriminatory, as well as conduct that is dishonest or in bad faith, are based on the source of the duty in the union's statutory role as exclusive representative. In *Steele v. Louisville &*

⁷ Accord *United Steelworkers v. Rawson*, 110 S. Ct. 1904, 1911 (1990); *Chauffeurs, Local No. 391 v. Terry*, 110 S. Ct. 1339, 1344 (1990).

⁸ See also *Communications Workers v. Beck*, 487 U.S. 735, 743 (1988); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563-564 (1976); *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299 (1971); *Humphrey v. Moore*, 375 U.S. 335, 342, 350 (1964).

⁹ See, e.g., *Steele v. Louisville & N. R.R.*, 323 U.S. 192, 198-207 (1944) (Railway Labor Act); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953) (extending doctrine to National Labor Relations Act).

N. R.R., 323 U.S. 192, 202 (1944), the Court squarely grounded the duty of fair representation in the union's function as exclusive representative; the Court noted that "the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf." See also *id.* at 204 (duty "inseparable from the power of representation"). This link between the union's role as exclusive agent — entailing the removal from bargaining unit members of "all [other] effective means of protecting their own interests," *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 164 n.14 (1983)¹⁰ — and its duty of fair representation is a consistent thread running through this Court's cases concerning the nature and scope of that duty. See, e.g., *United Steelworkers v. Rawson*, 110 S. Ct. at 1911; *Bowen v. United States Postal Service*, 459 U.S. 212, 226 (1983); *International Bhd. of Elec. Workers v. Foust*, 442 U.S. at 46 & n.8; *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976); *Vaca v. Sipes*, 386 U.S. at 176; *Humphrey v. Moore*, 375 U.S. 335, 342 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953).

The grant to a union of the statutory right of exclusive representation carries with it a correlative duty to those the union represents. This duty is in many respects akin to the fiduciary duties owed by an agent to his principal, see Restatement (Second) of Agency §§ 378-398 (1958), or by a trustee to the trust beneficiaries, see Restatement (Second) of Trusts §§ 170-185 (1954); *Chauffeurs, Local No. 391 v. Terry*, 110 S. Ct. 1339, 1346 (1990) (plurality opinion); *id.* at 1355-1356 (Kennedy, J., dissenting). Just as

¹⁰ See *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338-339 (1944); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

an agent or trustee has both a duty of loyalty, see Restatement (Second) of Agency §§ 387-398; Restatement (Second) of Trusts § 170, and a duty of care, see Restatement (Second) of Agency § 379; Restatement (Second) of Trusts § 174, so a union has both a duty to act honestly and in good faith (comparable to a duty of loyalty) and a duty to avoid arbitrary or discriminatory conduct (comparable to a duty of care). In each case, imposition of the duty to the represented party is a necessary complement to the selection of the representative to protect that party's interests.

To be sure, analogies between a union's duty of fair representation and an agent's or trustee's fiduciary duties are imperfect at best,¹¹ and the precise scope of the duties of loyalty and care imposed upon a union, agent, or trustee vary with the circumstances. Moreover, courts should be mindful of the danger that unduly stringent judicial supervision may interfere with the representative's ability to perform its function. Nonetheless, the law does impose an obligation on one who performs a representative function not merely to act in good faith, but also to act reasonably to advance the interests of the represented party. Although the scope of the latter duty may be shaped to accommodate the unique needs of the system ordained by the federal labor laws, it would be incongruous — particularly since a majority of employees in a unit may designate a representative to act for *all* employees in that unit — to dispense with it altogether.

For this reason, the *Vaca* three-part standard — and not merely the requirement that the union act in good faith — should apply to a union whenever it is exercising its representative functions.

3. In its petition for certiorari, petitioner contended that the scope of the duty of fair representation depends

¹¹ Cf. *Terry*, 110 S. Ct. at 1357 (Kennedy, J., dissenting).

entirely on whether a union is performing a contract negotiation function or a contract administration function. Petitioner asserted that the union's exercise of "negotiating judgment" should be subject to review by a trier of fact *only* to the extent that the conduct at issue "fails to meet the standard of 'complete good faith and honesty of purpose.'" Pet. 19. This limitation, it argued, should be required because of "the complexity of the task [of reconciling conflicting interests among unit members], the range of more or less reasonable options available, and the authority of unions to act as autonomous agents on behalf of their members." *Id.* at 16 (quoting *Thomas v. United Parcel Service, Inc.*, 890 F.2d 909, 917 (7th Cir. 1989)).¹² Petitioner contrasted this situation with the "ministerial" role of the union in contract administration, and the correspondingly more stringent standard prohibiting arbitrary and discriminatory, as well as dishonest or bad-faith, conduct. *Ibid.*

Petitioner's suggested distinction is largely illusory, and thus does not support a significant divergence between the standards applied in contract negotiation and contract administration. In contract administration, a particular grievance may implicate the sometimes-conflicting interests of all of the members of the bargaining unit, and the processing and resolution of such a grievance may more closely resemble the negotiation of a contract than the determination of an individual's claim. For example,

¹² It should be noted that others who act in a representative or fiduciary capacity similarly may be responsible for reconciling conflicting interests of those they represent. Although an agent ordinarily may not represent principals with conflicting interests, a trustee may well find that the trust beneficiaries have opposing interests. In that circumstance, the trustee remains subject to a duty of care, and he acquires the additional duty to deal impartially with each beneficiary. Restatement (Second) of Trusts § 183 (1954).

Humphrey v. Moore, 375 U.S. 335 (1964), involved a claimed violation of a union's duty of fair representation in the processing of a grievance relating to the appropriate method of merging the seniority lists of two firms that had combined certain operations. Unlike a more typical grievance proceeding involving a particular employee's claim of mistreatment by an employer, the claim in *Humphrey* required the resolution of broad questions affecting most or all of the members of the bargaining unit.¹³

In contract negotiations, on the other hand, the issues frequently do not necessitate accommodation of the conflicting interests of competing members of the bargaining unit. Especially at the plant level, contract negotiations may involve bargaining over some matters that affect only one, or a very few, employees, and that do not have a broad impact on the bargaining unit as a whole.¹⁴ For example, a union may seek to negotiate a longer period of preparation time for a few employees whose special duties require a number of preliminary activities (clothes changes, sterilization, etc.) before starting work. Similarly, although the order and award in this case treated reinstatement rights in general terms, back-to-work agree-

¹³ The type of claim at issue in *Humphrey*, arising out of an allegation that a union breached its duty of fair representation in reconciling seniority lists when two firms combine, is not uncommon. See, e.g., *Haerum v. Airline Pilots Ass'n*, 892 F.2d 216, 221-222 (2d Cir. 1989); *Dement v. Richmond, F. & P. R.R.*, 845 F.2d 451, 458 (4th Cir. 1988); *Thomas v. Bakery Workers Union*, 826 F.2d 755, 758-759 (8th Cir. 1987); *Masy v. New Jersey Transit Rail Operations, Inc.*, 790 F.2d 322, 327-328 (3d Cir. 1986); *Alvey v. General Electric Co.*, 622 F.2d 1279 (7th Cir. 1980).

¹⁴ A further difficulty with the negotiation/administration distinction is that some union representative functions—for example, the operation of a hiring hall—may not readily fall into either category. See *Breining v. Sheet Metal Workers Int'l Ass'n*, 110 S. Ct. 424 (1989).

ments frequently determine reinstatement rights of particular named employees.

This Court has recognized the difficulty of drawing any sharp line between contract negotiation and contract administration. As the Court has observed, "[t]he grievance procedure is * * * a part of the continuous collective bargaining process," *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960); accord *Del Costello v. International Bhd. of Teamsters*, 462 U.S. at 169; *United Parcel Service v. Mitchell*, 451 U.S. 56, 63-64 (1981). Similarly, the bargaining process "involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract." *Conley v. Gibson*, 355 U.S. 41, 46 (1957). Because the two functions are often similar both in practice and in principle, it would be difficult in fact—and unfortunate in theory—for the standard of conduct required of the union to depend on which characterization seems more apt in a particular case.

B. A UNION'S CONDUCT IS ARBITRARY ONLY IF THAT CONDUCT, VIEWED FROM THE STANDPOINT OF THE UNION AT THE TIME ITS DECISION IS MADE, FALLS OUTSIDE A "WIDE RANGE OF REASONABLENESS"

1. In *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), the Court recognized that, in light of the "differences * * * in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees, * * * [a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion" (emphasis added). Petitioner reads this language (see Pet. 19) to eliminate any inquiry into whether a union

has acted arbitrarily while carrying out its bargaining function.

We submit that the Court's statements in *Ford Motor* do not naturally bear the meaning petitioner asserts. Actions that are arbitrary scarcely can be characterized as falling within a range of "reasonableness," however wide that range may be. Instead, the quoted passage is better understood as recognizing two distinct branches of the duty of fair representation: the duty to avoid conduct that falls outside a "wide range of reasonableness," and the duty to avoid conduct that is not performed in "good faith and honesty of purpose." *Ford Motor* thus does not conflict with the tripartite classification in *Vaca*.

2. Nonetheless, in holding that a union must be allowed a "wide range of reasonableness," *Ford Motor* did recognize that a union must be afforded considerable leeway for the exercise of judgment if it is to act effectively on behalf of bargaining unit members. Such leeway is essential to the performance of the critical function of accommodating conflicting interests among unit members, who often will share unequally in the duties and obligations the union is able to attain from the employer. See also *Humphrey v. Moore*, 375 U.S. at 349-350. Moreover, a union must be able to seize fleeting opportunities for reaching agreement and to respond quickly to management initiatives.¹⁵ And a union must act within constraints imposed by deadlines and scarce resources that can limit

¹⁵ Indeed, one of the purposes of the Railway Labor Act is "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions." 45 U.S.C. 151a(4) (emphasis added). See also 45 U.S.C. 152 Second ("All disputes * * * shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier * * * and by the employees") (emphasis added).

its ability to devote extensive study, investigation, and analysis to each action it takes. Finally, a union's decision-making—particularly during a strike—must be guided by essentially unverifiable assessments of whether the economic power it can wield will be sufficient to attain its objectives. To a significant extent, then, the vehicle for controlling a bargaining representative is not judicial review; rather, reliance must be placed on democratic procedures guaranteed by federal law for selection of that representative and for election of union leaders. See *Wirtz v. Hotel Employees Union*, 391 U.S. 492, 497 (1968).

3. The question whether a union's conduct falls within the permissible "range of reasonableness" should be considered from the standpoint of the union at the time it took the challenged action. As in other contexts in which the law protects decisionmakers from the corrosive effect of judicial second-guessing, strict *post hoc* review of union decisions threatens the union's ability to act effectively on behalf of those it represents. Therefore, the *Vaca* standards should be applied with keen sensitivity to the situation confronting the union at the time it acted. In this respect, there is an analogy between the standards applicable to union conduct and the standards applicable to others who may be liable for injuries inflicted, but whose exercise of independent judgment is entitled to protection.

For example, it has long been recognized that, although corporate directors owe duties of loyalty and care to shareholders, their disinterested business judgment will not be judicially scrutinized if the directors "had a rational basis for believing that the business judgment was in the best interests of the corporation." ALI, *Principles of Corporate Governance: Analysis and Recommendations* § 4.01(d)(3) (Tent. Draft No. 3, 1984); accord *Panter v. Marshall Field & Co.*, 646 F.2d 271, 293 (7th Cir. 1981); *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971). See gen-

erally Arsh, *The Business Judgment Rule Revisited*, 8 Hofstra L. Rev. 93 (1979). Furthermore, the inquiry into whether a director had such a rational basis must be conducted from the standpoint of "an ordinarily prudent person * * * in like position and under similar circumstances." ALI, *Principles of Corporate Governance*, *supra*, § 4.01(a); 3A W. Fletcher, *Cyclopedia of Corporations* § 1030, at 19 (perm. ed. 1975).

Similarly, there is a useful analogy between the *Ford Motor* standard and the standard governing the availability of qualified immunity to public officials. Although such officials are not generally accorded absolute immunity, see *Butz v. Economou*, 438 U.S. 478 (1978), their official actions are entitled to immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818-819 (1982). In *Harlow*, the Court emphasized that, in deciding whether the law was clearly established, a court must determine "not only the currently applicable law, but whether that law was clearly established *at the time an action occurred*." 457 U.S. at 818 (emphasis added).

Thus, in all three contexts, the appropriate standards of conduct—a "wide range of reasonableness" in the case of unions, a "rational basis" in the case of corporate directors, the need for the allegedly violated law to have been "clearly established" in the case of public officials—reflect concern that the entity or official involved will be rendered ineffective if faced with potential liability for merely mistaken judgments. Similarly, in all three areas, judicial inquiry proceeds *ex ante*, from the standpoint of the decisionmaker at the time of the decision, and takes into account the constraints of time, limited information, and

limited resources under which the decisionmaker was operating.¹⁶

* * * * *

In sum, *Ford Motor* struck an appropriate balance by subjecting union conduct to a "wide range of reasonableness" standard. To impose a more stringent standard of objective judgment would threaten a union's ability effectively to perform its core representational function. Yet, to impose a wholly subjective "bad faith" standard would err in the other direction, shielding a union when it has failed to fulfill its representational function or, worse, succeeded in concealing a bad-faith motive for its conduct.

C. BECAUSE THE AGREEMENT AT ISSUE IN THIS CASE, VIEWED FROM THE STANDPOINT OF THE UNION DECISIONMAKERS AT THE TIME IT WAS NEGOTIATED, REFLECTED A REASONABLE JUDGMENT THAT THE AGREEMENT WAS PREFERABLE TO AN UNCONDITIONAL RETURN TO WORK, THE COURT OF APPEALS ERRED IN HOLDING THAT THE UNION ACTED ARBITRARILY BY CONSENTING TO THAT AGREEMENT

Although the court of appeals correctly held that a union's conduct of negotiations, as well as its processing of grievances, is subject to the tripartite *Vaca* standard, the court erred in its application of that standard to this case.

1. The court of appeals approached this case as if the central issue was whether the union gained anything of value by consenting to the order and award, in return for giving up rights that would have been available to the

¹⁶ As the Court made clear in *Harlow*, even if the law asserted to be violated was clearly established at the time of the challenged official action, an immunity defense would be established "if the official * * * claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard." 457 U.S. at 819.

striking pilots had they simply submitted an unconditional offer to return to work. This approach, we believe, was fundamentally mistaken. To be sure, we assume that a union would be acting arbitrarily, and thus in breach of its duty of fair representation, if it gave up a clearly established right of bargaining unit members without gaining anything in return. But the inquiry should always be focused on the costs and benefits of the union's action *as they would have appeared to the union at the time it acted*.¹⁷ The issue before the court of appeals was thus not whether the order and award in fact disadvantaged the returning strikers, but whether the union acted within a "wide range of reasonableness" in agreeing to the compromise in light of the legal and practical uncertainties confronting the union at that time.¹⁸ Viewed from this perspective, the union's conduct was not arbitrary.

a. The court of appeals rested its decision on its conclusion that "a jury could find that the order and award

¹⁷ Of course, the benefits that a union gains in a particular agreement may not simply be the acquisition of additional contractual rights. For example, there are cases in which the employer is in financial distress and a union representing the employees agrees to give up rights guaranteed by a collective agreement. In such cases, courts have generally found that the union has obtained a benefit in return: the survival of the employer and thus of the jobs of bargaining unit members. See, e.g., *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), cert. denied, 490 U.S. 1066 (1989); *Schultz v. Owens-Illinois Inc.*, 696 F.2d 505, 516 (7th Cir. 1982); *Hendricks v. ALPA*, 696 F.2d 673, 677 (9th Cir. 1983).

¹⁸ Compare *Morgan v. St. Joseph Terminal R.R.*, 815 F.2d 1232, 1234 (8th Cir. 1987) (rejecting claim that union violated duty by negotiating agreement that left employees with less generous benefits than they would have had absent agreement; ~~on the ground that~~ union's belief that agreement was advantageous was not "unreasonable or arbitrary") *Anderson v. Ideal Basic Industries*, 804 F.2d 950, 953 (6th Cir. 1986) (same).

left the striking pilots worse off in a number of respects than complete surrender to [Continental]." Pet. App. B11. According to the court, "[a] factfinder could infer that had ALPA unconditionally offered to return the pilots to work, the strikers would have been recalled in seniority order, and would have been able to successfully bid for [the 85-5 positions] and also preserve their litigation rights against [Continental]." Pet. App. B14. Since the agreement gave the returning pilots only *some* of the positions encompassed by the 85-5 bid, and provided those positions only subject to certain restrictions, the court found that the order and award deprived the returning pilots of some rights they would have had if an unconditional offer of return to work had been made, while offering nothing of value by way of compensation.

b. Had it conducted its inquiry from the perspective of the union at the time it entered into the order and award, the court of appeals should have recognized that the clear landscape that it discerned would have appeared cloudy and full of risks. In particular, the court's conclusion that "the returning strikers, as CAL employees, were entitled to reinstatement as vacancies occurred"—enabling the returning strikers to compete for positions that Continental contended had already been "awarded" in the 85-5 bid—would have been far from clear to the union. Pet. App. 12.

Under this Court's decisions, Continental was entitled to employ permanent replacements and cross-over strikers to continue operations during the strike and was not required to discharge those employees to make room for returning strikers. *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938); *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 109 S. Ct. 1225 (1989). On the other hand, Continental would have been required to offer returning strikers *vacant* positions

equivalent to those the strikers had held before going on strike (absent countervailing legitimate and substantial business justifications for refusing to do so). *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). Unjustified refusals to reinstate strikers who offer unconditionally to return to work "discourage employees from exercising their rights to organize and to strike." *Ibid.*

The issue left unsettled by this Court's decisions is whether 85-5 positions "awarded" to working pilots would have been considered "vacancies" available to returning strikers. Continental's position, as we understand it, has been that the bid procedure serves its legitimate interest in designating particular employees for anticipated vacancies in advance, so that the airline can begin at once to provide necessary training and arrange to fill positions vacated by pilots who have bid successfully for better jobs. Under that position, refusing to open those vacancies to re-bidding in order to accommodate returning strikers could not be characterized as an unjustifiable infringement of the right to strike. The countervailing argument, as we understand it, is that an award of a position confers only a limited, conditional expectancy of obtaining that position at some future time and thus it would not have undercut Continental's legitimate interests to place returning strikers in positions that were not actually filled or for which training had not commenced. If that view of the bidding process is valid, a refusal to allow returning strikers equal access to positions not actually occupied when they agreed to return might be viewed as an unjustified infringement of the right to strike.

Regardless of how this dispute is resolved on its merits, we believe that, in view of the uncertain circumstances, there is no basis on which a trier of fact could find that the union's decision to opt for a compromise was *arbitrary*. A union in petitioner's position could legitimately take ac-

count of the risks and delay inherent in litigation in deciding whether to agree to a negotiated settlement. Indeed, the union's decision to consent to the order and award might fall within the "wide range of reasonableness" even if the union could have been certain that, after protracted litigation, it could have obtained a judgment entitling the returning strikers to the 85-5 bid positions.

It is not necessary, however, to reach the issue whether the risk of lengthy litigation would alone support a union decision to compromise claims of bargaining unit members. For in this case, the only contemporaneous support that the court of appeals found for its legal conclusion that the 85-5 bid positions were "vacant" was *ALPA v. United Air Lines, Inc.*, 614 F. Supp. 1020 (N. D. Ill. 1985), aff'd in part, 802 F.2d 886 (7th Cir. 1986), cert. denied, 480 U.S. 946 (1987), a district court decision from another circuit that was on appeal at the time the union consented to the order and award. See note 4, *supra*. Since the outcome of the appeal of that decision was uncertain, and since the decision of another circuit would not in any event be controlling in the Fifth Circuit (where most of the litigation between petitioner and Continental had occurred), the union's failure to rely on *United Air Lines* and to reject the order and award surely was not arbitrary. Compare *Burkevich v. ALPA*, 894 F.2d 346, 351-352 (9th Cir. 1990). Moreover, the *United Air Lines* decision rested on a factual premise that may well not have been present in this case.¹⁹ Thus, there is little doubt that the union's

¹⁹ In *United Air Lines*, the carrier rebid the entire airline in the early days of a strike, and the district court concluded (in light of other facts) that the rebid was motivated by anti-union animus. 614 F. Supp. at 1046. The court of appeals affirmed on this basis. 802 F.2d at 898-900. The availability of such a rationale to attack the purported "award" of the 85-5 bid positions in this case was—at the very least—subject to doubt.

failure to reject the order and award on the basis of *United Air Lines* was well within the "wide range of reasonableness" to which the union is entitled.

c. The decision of the court of appeals is legally doubtful in another respect. This Court has recognized that an "allegation of mere negligence will not state a claim for violation of [the duty of fair representation]." *United Steelworkers v. Rawson*, 110 S. Ct. at 1913.²⁰ To impose liability for negligent representation of employees would impair the national labor policy that substantive decisions as to the appropriate resolution of labor disputes should be made by the employees acting through their exclusive representative. Cf. *International Ass'n of Machinists v. Street*, 367 U.S. 740, 755-760 (1961).

The judgment of the court of appeals in this case was inconsistent with *Rawson* because it allowed imposition of liability on the union for what was at worst simply a negligent failure accurately to assess the evolving legal status of the returning strikers and accurately to predict Continental's response to an unconditional offer to return to work.²¹ Assuming that the court of appeals was correct in holding that the 85-5 bid positions—"awarded" but not yet occupied—were legally "vacant" and thus open to returning strikers, the court's reasoning nonetheless would

²⁰ The NLRB has consistently taken the position adopted by the Court in *Rawson*. See, e.g., *Sheet Metal Workers' Int'l Ass'n*, 291 N.L.R.B. No. 41 (Sept. 30, 1988), aff'd on other grounds, 902 F.2d 810 (10th Cir. 1990), petition for cert. pending, No. 90-400; *Rainey Security Agency*, 274 N.L.R.B. 269 (1985); *Paint Workers Union*, 270 N.L.R.B. 506 (1984); *Office Employees Int'l Union, Local No. 2*, 268 N.L.R.B. 1353 (1984); *Teamsters Local 282*, 267 N.L.R.B. 1130 (1983), enforced, 740 F.2d 141 (2d Cir. 1984); *General Truck Drivers Union, Local 692*, 209 N.L.R.B. 446, 447-448 (1974).

²¹ It should be noted that *Rawson* was decided on May 14, 1990, over five months after the Fifth Circuit's decision in this case.

have failed to show that the union was guilty of anything more than "mere negligence." Insofar as the union acted as it did because it failed to appreciate the legal significance of the district court decision in *United Air Lines*, the union was at worst simply negligent. And insofar as the union was motivated by a fear—exaggerated, in the court's view—that the returning strikers would be able to vindicate their legal rights to the 85-5 bid positions only after costly and protracted litigation, the union still was at worst guilty of negligently failing to make an accurate assessment of the costs and benefits of submitting an unconditional offer to return to work.²²

d. The facts of this case illustrate the dangers of basing liability for breach of a union's duty of fair representation on a *post hoc* inquiry into whether the union in fact made the correct decision—in this case, concerning the legal rights of returning strikers and the risks inherent in asserting such rights—in carrying out its representative function. National labor policy, as embodied in the Railway Labor Act, imposes a duty upon the parties "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes * * * in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U.S.C. 152 First. See *Brotherhood*

²² Respondents argued below that petitioner's leadership consented to the entry of the order and award based upon self-interest and political motivations, concealed their actions from the rank-and-file and their representatives, and falsely assured striking pilots that any agreement would be submitted for ratification. See Pet. App. B7. The court of appeals did not decide whether there were disputed issues of fact requiring a trial on those allegations of bad faith. These theories of liability could be considered on remand if the Court decides to reverse the judgment of the court of appeals.

of *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-378 (1969); *Chicago & N.W. Ry. v. United Transportation Union*, 402 U.S. 570, 574 (1971); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 758-761 (1961). When, as in this case, such disputes have led to a strike, there is a strong public interest in re-establishing the smooth flow of interstate commerce. Yet a union's ability to negotiate an end to the strike may be seriously impaired if it knows that a choice later determined to have been mistaken will expose it to substantial liability. Decisions imposing such liability can only complicate the efforts of management, unions, and federal mediators to achieve negotiated resolutions of labor disputes.²³

D. THE ORDER AND AWARD DID NOT IMPERMISSIBLY DISCRIMINATE AGAINST RESPONDENTS

The court of appeals also erred in holding that the union breached its duty of fair representation in this case "by negotiating a settlement which impermissibly discriminated against strikers." Pet. App. B14-B15. The court found that the order and award "preserved strikers and nonstrikers as two distinct groups after recall." Pet. App. B15. According to the court, this amounted to discrimination inconsistent with this Court's decision in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

In *Erie Resistor*, the Court affirmed the NLRB's finding that an employer had committed an unfair labor practice when it granted replacement workers extra seniority during a strike. After the strikers returned to work, the "super-seniority" enabled the replacement workers successfully to retain their jobs in place of otherwise more senior strikers during a subsequent lay-off. 373 U.S. at

²³ Cf. *International Bhd. of Elec. Workers v. Foust*, 442 U.S. at 51-52.

224. This permanent "cleavage in the plant" that "continu[ed] long after the strike [had] ended * * * [stood] as an ever-present reminder of the dangers connected with striking and with union activities in general" (*id.* at 231), and thus unduly interfered with the employees' right to strike. As the Court has since explained, "a continuing diminution of seniority upon reinstatement at the end of the strike was central" to the decision in *Erie Resistor*. *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 109 S. Ct. at 1232.

The Court in *Erie Resistor* affirmed a decision by the NLRB that the employer had committed an unfair labor practice. Thus, the case did not address the scope of a union's duty of fair representation, and yet the court of appeals failed even to consider the threshold question whether a union's consent to a superseniority provision like that at issue in *Erie Resistor* would constitute the sort of "discrimination" that would violate that duty. And even if it would, we believe the court of appeals erred in concluding that the order and award in this case, like the unlawful conduct in *Erie Resistor*, permanently diminished the seniority of the striking pilots.

The order and award does not appear to have created a "continuing diminution of seniority" for the striking pilots, and thus did not violate the principles set down in *Erie Resistor*. To be sure, the order and award did alter the order of reinstatement, permitting working pilots to retain just over half of the 85-5 bid positions while returning strikers received the other half. In addition, the order and award provided that future positions would be open to working pilots and returning strikers in a 1:1 ratio, until all strikers had returned to work. But those terms simply governed the order and mechanism for reinstatement of returning strikers; they did not permanently alter the seniority system.

As petitioner has pointed out (Pet. 27), the order and award in this case sets up a mechanism analogous to that upheld by this Court in *Trans World Airlines*. As in *Trans World Airlines*, "any future reductions in force * * * will permit reinstated full-term strikers to displace junior [replacements]." 109 S. Ct. at 1231. In addition, "[s]hould any vacancies develop * * *, reinstated full-term strikers who have bid on those vacancies will maintain their priority over junior [replacements]." *Ibid.* The only permanent effect of the order and award is that, in the absence of a reduction in force, the pilots who worked during the strike will retain the favorable positions they obtained during the strike, even if more senior full-term strikers are thereby forced to remain in less desirable jobs. This effect, however, is simply the result of the rule of *NLRB v. MacKay Radio & Telegraph Co.*, combined with an agreement reached against a background of legal uncertainty as to whether the 85-5 bid positions had been filled by the "awards" to replacement workers. The union's consent to that agreement thus does not establish "discrimination" that would constitute a breach of the union's duty of fair representation.

CONCLUSION

The decision of the court of appeals should be reversed.
Respectfully submitted.

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No. 89-1493

In the
Supreme Court of the United States
October Term, 1990

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,
v.

JOSEPH E. O'NEILL, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE A BRIEF
AMICUS CURIAE FOR CONTINENTAL AIRLINES, INC.
AND BRIEF AMICUS CURIAE FOR CONTINENTAL
AIRLINES, INC. IN SUPPORT OF REVERSAL

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In the
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October Term, 1990

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On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

**MOTION FOR LEAVE TO FILE A BRIEF
AMICUS CURIAE FOR CONTINENTAL AIRLINES, INC.**

Pursuant to Rule 37 of the Rules of this Court, Continental Airlines, Inc. respectfully moves for leave to file the attached brief amicus curiae in this case supporting reversal of the decision of the United States Court of Appeals for the Fifth Circuit. Counsel for petitioner Air Line Pilots Association, International has consented to the filing of this brief; counsel for respondents O'Neill Group has refused consent.

1. Although not a party to this lawsuit, Continental is a party to the settlement at issue, and has a direct and significant interest in preserving and defending the

settlement. The O'Neill Group has filed a separate action against Continental challenging the terms of the settlement.^{1/} Both Continental and its 4,000 incumbent pilots have relied upon the terms of this settlement for over five years; Continental has long since fulfilled its commitments on pilot promotions and distributed more than \$17 million in severance pay to 366 pilots pursuant to the settlement. In addition, the settlement, which directly resolved over \$2 billion in bankruptcy claims and established procedures for resolving millions more, was a critical part of Continental's reorganization plan, which was approved and became effective in 1986. Invalidating of any part of the settlement and any attempt to restore the status quo ante would be severely prejudicial to Continental and virtually impossible.

2. Both ALPA and the O'Neill Group are adversaries of Continental, and for tactical or institutional reasons neither has had an incentive to develop for this Court, or the courts below, all of the benefits that the strike settlement provided the striking pilots, or all of the weaknesses in ALPA's legal position opposing Continental's actions prior to the settlement. Continental seeks through this brief to provide the Court a more complete description of the facts and circumstances surrounding the negotiation and implementation of the settlement.

3. More generally, neither ALPA nor the O'Neill Group has any incentive to provide this Court with an employer's perspective on the issue presented. Although actions premised upon the duty of fair representation are brought by employees against unions, employers may be directly affected by the outcome of any such suits. Adoption of a standard for evaluating duty of fair representation claims

that unduly restricts a union's ability to act would undermine employers' confidence in unions' bargaining authority, and would make the negotiation and resolution of difficult strike and related issues less likely, if not impossible. Employers no less than unions have an interest in ensuring that collectively bargained agreements not be subject to second-guessing by disgruntled union members or by lay jurors invited to speculate under the ruling below.

CONCLUSION

For the foregoing reasons, Continental respectfully requests that the Court grant this motion for leave to file the attached brief amicus curiae supporting reversal.

Respectfully submitted,

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CONTINENTAL AIRLINES, INC.

November 15, 1990

^{1/} O'Neill v. Continental Airlines, Inc., Civil Action No. 87-239 (S.D. Tex., filed January 26, 1987).

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On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

**BRIEF AMICUS CURIAE FOR CONTINENTAL
AIRLINES, INC. IN SUPPORT OF REVERSAL**

INTERESTS OF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of this Court, Continental Airlines, Inc. submits this brief amicus curiae subject to the granting of the attached Motion For Leave To File A Brief Amicus Curiae.

The amicus supports reversal of the decision by the United States Court of Appeals for the Fifth Circuit. The interests of the amicus are stated in the attached Motion, and are not repeated here.

STATEMENT OF FACTS^{2/}

A. Continental Files Bankruptcy In 1983; ALPA Commences A Bitter Two Year Strike

On September 24, 1983, Continental filed a petition for reorganization under chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101, *et seq.*, substantially curtailed its flight operations, rejected its collective bargaining agreement with ALPA, and established emergency work rules to govern its pilots until a new agreement could be negotiated.^{3/} CAL App. at A-1. On October 1, 1983, in response to Continental's rejection of its labor contract,

^{2/} As a result of a protective order entered by the district court, Continental has not had access to the record in this case. The facts set forth herein are taken from final court decisions and from the Declaration of Donald Breeding filed in the Fifth Circuit with Continental's Motion To Intervene For Limited Purpose And Petition For Rehearing; a copy of the Breeding Declaration is included in the Appendix to this brief [hereinafter "CAL App."] at A-1. Continental's motion to intervene in the Fifth Circuit was denied. The settlement agreement is reproduced at Appendix 4 to ALPA's petition for certiorari [hereinafter "ALPA App."].

^{3/} Continental's filing of bankruptcy and its rejection of its collective bargaining agreements was the subject of extensive litigation in the bankruptcy court. *See, e.g., In re Continental Airlines, Inc.*, 38 Bankr. 67 (Bankr. S.D. Tex. 1984) (denying motion by unions to dismiss bankruptcy petitions as having been filed in bad faith); Memorandum of Authorities Authorizing Rejection of Air Line Pilots Association Collective Bargaining Agreements, *In re Continental Airlines Corp.*, Consolidated Case No. 83-04019-H2-S (Bankr. S.D. Tex. August 17, 1984) (authorizing rejection of collective bargaining agreement with ALPA). CAL App. at A-17.

ALPA commenced a strike against Continental. *Id.* at A-19.

ALPA's strike created a severe shortage of pilots and crippled Continental's remaining flight operations. In late November 1983, after undertaking substantial efforts to get striking pilots to return to work, Continental began hiring permanent replacement pilots. *Id.* at A-36. With the aid of the permanent replacements and a growing number of crossover pilots, Continental gradually rebuilt its operations. By August 1985, Continental employed approximately 1,600 active pilots, including over 400 former strikers who had abandoned ALPA's strike, and approximately 200 pilots who had elected not to strike. CAL App. at A-11.

The two-year ALPA strike at Continental was exceptionally hostile and bitter. There were repeated incidents of harassment of passengers and working pilots, including an incident for which two striking pilots were convicted of federal felony offenses for possession of unlawful explosive devices, apparently intended for use in pipe bombing the homes of certain working pilots. *See In re Continental Airlines Corp.*, 907 F.2d 1500, 1518 n.14 (5th Cir. 1990); CAL App. at A-4. Continental also obtained injunctions against ALPA and striking pilots for harassment of working employees and passengers and obstruction of airport access in Houston, Dallas, San Antonio, and San Diego. *Id.* at A-5. Other strike-related violence included telephone death threats, arson of a working pilot's barn and another's house, the release of noxious odor bombs in Continental terminals at the Houston and Denver airports, the jamming of aircraft communication systems, and hundreds of incidents of

vandalism to the property of working pilots. *Id.* Indeed, ALPA attached such a high priority to the strike that for over two years it paid extraordinary strike benefits at the rate of \$3,800 per month to the striking Captains and \$2,400 per month to striking First and Second Officers. *Id.*

B. Continental Continued To Conduct Pilot System Bids During ALPA's Strike In Order To Staff The Airline

Each commercial airline pilot is required by FAA regulations not only to hold an FAA license, but also to undergo extensive initial training, and periodic re-training, to qualify to occupy a specific position (Captain, First Officer, Second Officer) on a specific aircraft type (DC-9, DC-10, 727, 747, etc.). See 14 C.F.R. § 121.433 (1989). Thus, pilots are not interchangeable and extensive pilot training is required as pilots advance to different positions. During ALPA's strike, Continental's ongoing expansion of operations required continuous pilot staffing and training assignments, a function historically served by a system bid. *CAL App. at A-7.* A system bid is a mechanism to establish a long-term training and assignment plan in which pilots bid for future assignments on the basis of seniority. A system bid serves to identify the right place of each bidding pilot, and determines the amount of training needed to qualify the pilot for his new position or equipment. A system bid was usually published at Continental as much as one year in advance of the final date by which the last pilot assigned by a bid is trained and in his new position. *Id.* Pilots occupy their new positions one-by-one as they complete the required training. The lengthy phase-in time required

between the award of a system bid and the conclusion of all necessary training is due to the large number of pilots who must be trained to occupy their new positions as well as training facility constraints which limit the number of pilots who can be trained simultaneously.^{4/} *Id.* Although a particular pilot may not be trained for some time after a system bid has been awarded, his assignment becomes fixed at the time the bid is awarded because the proper assignment and training schedule for all pilots is interdependent.^{5/} *Id. at A-8.*

It was Continental's consistent practice throughout the ALPA strike that striking pilots who made an unconditional offer to return to work were recalled to service in the order in which their offers to return were made, not in seniority order. *Id. at A-12.* Over 400 striking pilots returned to work in this manner between December 1983 and September 15, 1985. *Id. at A-10.*

^{4/} A system bid projects future pilot staffing needs by base of operation (geographic location), equipment (aircraft type), and pilot position (Captain, First Officer, Second Officer). The projections are based upon anticipated aircraft deliveries or dispositions, expected pilot retirement or attrition, and marketing plans for expansion, contraction, or realignment of future flight schedules. Once a system bid is published, each active Continental pilot bids his preferences for base, equipment, and position; the bids are then awarded based on seniority (subject to a number of exceptions not relevant here), assigning each pilot to a specific base, equipment, and position. *CAL App. at A-7.*

^{5/} Since ongoing flight operations must be maintained during the training associated with a system bid, the training commences from the bottom, beginning with Second Officers, typically the most junior pilots, who must be released from flight duty in order to be trained to occupy First Officer positions. Then First Officers become available to be trained as Captains. *CAL App. at A-8.*

On September 9, 1985, Continental posted system bid 1985-5. *Id.* at A-9. On September 15, 1985, while system bid 85-5 was open for bidding, ALPA informed striking pilots that they could return to work and participate in the bid if they so chose, but that the strike would continue. ALPA publicly described its position as a "strategic maneuver," and explained that "there is something to be said for having your people back on the property. It opens up new possibilities for achieving a solution once you have your foot in the door." CAL App. at A-9. Another ALPA communication stated that "[t]wo hundred reinforcements are on their way in . . . we've got our foot in the door and all we have to do now is kick the damn thing down." *Id.* Such statements and other information convinced Continental that ALPA was urging the striking pilots to submit bids as a subterfuge; that some or all of the striking pilots who submitted bids did not intend to return to work; and that the award of such bids would disrupt the training process and undermine Continental's ability to staff its future flight schedule. *Id.* at A-10. Accordingly, Continental refused to accept the bids submitted by the striking pilots and on September 25, 1985, Continental filed suit in federal court seeking an injunction against ALPA's conduct and a declaratory judgment on the invalidity of the challenged bids.^{6/} CAL App. at A-73. On October

^{6/} *ALPA v. Continental Airlines, Inc.*, Civil Action No. 85-5203 (S.D. Tex.). Continental's action was filed as a counterclaim in an earlier filed lawsuit by ALPA challenging Continental's withdrawal of its longstanding voluntary recognition of ALPA as the collective bargaining representative of Continental's pilots. Continental withdrew recognition from ALPA as the prospective representative of all Continental pilots after verifying the signatures of over 1400 pilots, a majority of all pilots, who signed a petition seeking ALPA's removal as their bargaining representative.

14, 1985, Continental awarded system bid 85-5 entirely to working pilots (including the pilots who had abandoned the strike before September 15).

C. Continental And ALPA Enter Into A Strike Settlement Agreement

On July 2, 1985, the bankruptcy court had ordered Continental and ALPA to reconvene settlement negotiations in an effort to resolve their differences and thereby expedite a plan of reorganization. In late October 1985, after lengthy and intensive negotiations in which Bankruptcy Judge Roberts served as mediator, the parties reached agreement on a variety of issues including the termination of ALPA's strike, detailed return to work procedures, and the settlement of numerous bankruptcy claims and litigation. At the joint request of ALPA and Continental, on October 31, 1985, Bankruptcy Judge Roberts entered an order and award embodying the terms of the agreement.^{7/} The settlement was subsequently approved by the bankruptcy court (Wheless,

^{7/} In its opening brief (at p. 35) to the Fifth Circuit in this case, the O'Neill Group conceded that virtually all of the terms of the settlement were negotiated by Continental and ALPA. *In re Continental Airlines Corp.*, 907 F.2d 1500 (5th Cir. 1990) describes in detail the history of litigation concerning subsequent efforts by the bankruptcy court, at the behest of the O'Neill Group, to modify the terms of the order and award. In affirming approval of the settlement as negotiated, the court found that it "attempt[ed] to satisfy each competing group of pilots by providing an order of recall for the returning strikers, by providing certain assurances as to future captain positions, and by providing certain limited restrictions on the exercise of seniority rights[.]" *Id.* at 1515. In sum, the court held, in a decision now final, that "the Order and Award is a valid, binding, enforceable settlement agreement." *Id.* at 1522-23.

J.) following notice and hearing pursuant to Bankruptcy Rule 9019.

The settlement was complex. Sections I and II (i) provided for the termination of ALPA's strike, (ii) prohibited Continental from retaliating in any manner against any former striker for any legally protected strike activity and prohibited ALPA from retaliating against pilots who worked during the strike, (iii) gave pilots terminated during the strike the right to arbitrate such termination, (iv) created detailed procedures for the return of striking pilots to work at Continental (including special protection against failure of medical or training requirements), (v) gave pilots who did not wish to return to work the option of resigning and receiving a generous severance payment, (vi) gave returning strikers almost half of the 85-5 bid captain position, and guarantees of further captain positions on a specified timetable; and (vii) established certain transition rules which allocated captain vacancies on a formula basis between working pilots and returning strikers.^{8/} The settlement expressly provided that "[s]triking pilots who elect recall will accrue seniority for all purposes during period of the strike and while awaiting recall[.]" ALPA App. at § I.B.9. Likewise, the settlement provided that in the event of a furlough, striking pilots previously recalled would have the full use of their accrued seniority, *i.e.*, working pilots

^{8/} The agreement allocated the first 100 captain positions in bid 85-5 to working pilots. The remaining 70 captain positions were allocated to returning full-term strikers. Thereafter, until October 1, 1988, subsequent captain vacancies would be allocated between working pilots and former full-term strikers on a one-to-one ratio. ALPA App. at § I.B.2(c)(ii).

with less seniority would be furloughed before more senior striking pilots. *Id.* at § I.B.2(d).

The settlement offered eligible striking pilots three options.^{9/} First, pilots could elect recall in seniority order in exchange for a waiver of certain claims against Continental ("Option 1"). Three hundred and twenty-five striking pilots elected Option 1. Second, striking pilots were given the option of terminating their employment and receiving special severance pay in exchange for a waiver of claims ("Option 2"). The 366 pilots who elected Option 2 received a total of \$17.3 million, an average of over \$47,000 per pilot; twenty pilots received over \$100,000.^{10/} CAL App. at A-14. Third, striking pilots could elect to retain their individual claims and return to work in the order in which they made an unconditional offer to return ("Option 3").

The remainder of the settlement provided for the resolution of bankruptcy claims and the settlement of numerous pending lawsuits, and provided a procedure for resolution by the bankruptcy court of any disputes

^{9/} The settlement agreement defined eligible striking pilots as "[a]ll pilots on the July 31, 1983 seniority list who are not currently active or on authorized leave and who have not resigned, retired, or been terminated for cause." ALPA App. at § I.B.1.

^{10/} Contrary to the Fifth Circuit's misreading of the settlement, Continental's exposure on the severance option was not capped at \$2.6 million. See 886 F.2d at 1442. The cap applied only to a small sub-group of pilots, *i.e.*, those pilots "who were not drawing ALPA strike benefits as of September 15, 1985 and were not on furlough status as of September 24, 1983[.]" CAL App at A-15; ALPA App. at § II. A.2. Indeed, based upon the \$17.3 million paid out to the 366 pilots who in fact elected Option 2, Continental's exposure if all eligible pilots had elected severance would likely have exceeded \$30-40 million.

concerning the interpretation or application of the agreement.

Three hundred forty nine pilots returned to work at Continental under the settlement (261 under Option 1 and 88 under Option 3). *Id.* at A-2. Those pilots have exercised their full seniority for all purposes other than bidding of their initial Captain position and have exercised their full seniority for that purpose also at least since the Fall of 1987;^{11/} 320 of these pilots had been advanced into or awarded Captain positions by October 1988. *Id.* (The remaining pilots either voluntarily elected to bid for lower status positions or did not have sufficient system seniority to hold a captain position of their choice, independent of the settlement.) *Id.*

SUMMARY OF ARGUMENT

The peaceful settlement of a labor dispute inherently requires compromise and the exercise of judgment as to the aggregate value of what is being given up as compared to what is being obtained in return. The duty of fair representation, as it has been developed by this Court, has recognized this necessity by according unions a "wide range of reasonableness" in exercising that judgment. The Fifth Circuit's decision in this case, in contrast, deprives unions of the necessary discretion by reviewing a complex settlement on a piecemeal basis, second guessing a union's assessment of legal issues and by permitting a jury to second guess a union's judgment

^{11/} Thus, at all times these returned pilots exercised their full seniority for such purposes as bidding monthly work schedules, bidding for vacation preference, and for all other purposes. CAL App. at A-2.

both as to the strength of its negotiating position, and as to the value of the trade-offs obtained in a settlement. The bargaining process will be substantially disserved if a union is at risk that a court or jury may subsequently disagree with its assessment of factual and legal issues at the time or with the merits of the ultimate agreement; employers will stand firm rather than compromise if they doubt the ability of the union to adhere to the compromise.

Measured against the proper standard, the strike settlement at issue in this case does not, as a matter of law, give rise to an inference that ALPA acted arbitrarily or irrationally in this agreeing to its terms. The Fifth Circuit's characterizations of the strength of ALPA's legal positions, and its speculation as to what Continental might have done in the absence of the settlement, are ex post facto determinations which ignore the factual and legal uncertainties which confronted ALPA at the time of the settlement. The Fifth Circuit has, in effect, reviewed the settlement de novo rather than simply reviewing whether, on the basis of the facts and the law as they were known to ALPA at the time, the settlement was within the "wide range of reasonableness" accorded to ALPA. Viewed as a whole, as the proper standard requires, the settlement obtained substantial benefits for the strikers, including over \$17 million in severance pay, the right to return to work in seniority order, and the right to approximately half of the Captain vacancies on bid 85-5 — none of which would have been available but for the settlement. As a matter of law, neither a Court nor a jury should be permitted to second-guess ALPA's judgment that the compromise was appropriate and that the substantial collective benefits that the settlement

obtained for the strikers justified the relinquishment of whatever tenuous claims they might have had to other benefits.

ARGUMENT

I. The Strong Public Interest In Stable Labor-Management Relations Requires That Negotiated Settlements Of Labor Disputes Not Be Subject To Second-Guessing By Dissatisfied Union Members

A. A Strict Standard For Evaluating A Union's Duty Of Fair Representation Would Cripple A Union's Ability To Reach Agreements

This Court has long recognized that a union's duty of fair representation does not require the complete satisfaction of every affected employee and that the diversity of employee interests and opinions, and the constraints imposed by often competing economic demands, may require a union to make choices and compromises which are not equally valued among its members. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563 (1976); *Humphrey v. Moore*, 375 U.S. 335, 349-50 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). Although the words used to describe the duty have varied,^{12/} the standard for evaluating union compliance with the duty of fair representation has accorded

^{12/} Compare *Huffman*, 345 U.S. at 338 (statutory representative must be allowed a wide range of reasonableness in bargaining, "subject always to complete good faith and honesty of purpose in the exercise of its discretion"), with *Vaca v. Sipes*, 386 U.S. 171, 190 (1971) ("A breach of the statutory duty of fair representation occurs only when a union's conduct . . . is arbitrary, discriminatory, or in bad faith.")

substantial deference to unions' exercise of judgment in the context of both contract administration^{13/} and contract negotiation.^{14/}

Because of the significant differences in a union's role in contract administration and contract negotiation, some courts have read this Court's decisions as creating different standards for determining whether a union has satisfied its duty in the two contexts. The existence of a different standard is usually said to arise from the different words this Court used to describe the standard in *Huffman*, a contract negotiation case, than in *Vaca v. Sipes*, 386 U.S. 171 (1971), a contract administration case. See, e.g., *Thomas v. United Parcel Service, Inc.*, 890 F.2d 909, 916 (7th Cir. 1989).

Whether the standard for evaluating the duty of fair representation varies depending upon the nature of the action taken, or remains the same but has sufficient flexibility to take into account the context in which the action was taken, a "wide range of reasonableness" is essential if a union is to be an effective representative of the interests of all members of the craft or bargaining unit. Unless unions are accorded some degree of deference in exercising their judgment, the collective bargaining process will be undermined as unions are paralyzed by the inability to reach the compromises

^{13/} E.g., *United Steelworkers of America v. Rawson*, 110 S.Ct. 1904, 1912 (1990); *Peterson v. Kennedy*, 771 F.2d 1244, 1254-55 (9th Cir. 1985), cert. denied, 475 U.S. 1122 (1986).

^{14/} E.g., *Huffman*, 345 U.S. at 338; *Thomas v. United Parcel Service, Inc.*, 890 F.2d 909, 918-19 (7th Cir. 1989); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519-20 (11th Cir. 1988), cert. denied, 109 S. Ct. 2066 (1989).

necessary to reach agreements.^{15/} Fearing suit by disgruntled members and second-guessing by a jury,^{16/} unions would be reluctant to "make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented." *Huffman*, 345 U.S. at 338. Similarly, employers could never be sure that unions' actions were final and binding, but rather will have to be constantly concerned that some sub-group of employees might be able to convince a jury that, from that sub-group's point of view, the agreement was "irrational."^{17/} As Justice Goldberg explained in a concurring opinion in *Humphrey v. Moore*, 375 U.S. at 358-59:

^{15/} Federal labor policy favors settlements of labor disputes. That policy is expressly set forth in the Railway Labor Act. 45 U.S.C. § 152, First. See *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969).

^{16/} In *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 110 S.Ct. 1339 (1990), this court held that a claim for backpay arising out of a violation of the duty of fair representation presents an issue triable by a jury.

^{17/} Federal labor law and policy extends to negotiated strike settlements which do not create a prospective collective bargaining agreement to govern all terms of employment for the entire craft or bargaining unit. Thus, in *Retail Clerks Int'l v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962), this Court confirmed jurisdiction under federal labor law to enforce a strike settlement agreement between an employer and a union that no longer represented a majority of the employees in the bargaining unit. In an unpublished decision to which the O'Neill Group was a party, the Fifth Circuit upheld ALPA's authority to enter into the strike settlement at issue here and confirmed that ALPA did in fact represent the pilots still on strike in the settlement negotiations. *Texas Air Corp. v. O'Neill*, No. 89-2435 (5th Cir. April 13, 1990). CAL App. at A-69. The court went on to hold that "[t]he strike settlement that ended the strike and contained detailed back-to-work provisions clearly resolved a 'major' dispute. In negotiating that settlement, ALPA had the authority to settle all claims arising out of that dispute[.]" *Id.* at A-71.

[I]n safeguarding the individual against the misconduct of the bargaining agent, we must recognize that the employer's interests are inevitably involved whenever the labor contract is set aside in order to vindicate the individual's right against the union. The employer's interest should not be lightly denied where there are other remedies available to insure that a union will respect the rights of its constituents. Nor should trial-type hearing standards or conceptions of vested contractual rights be applied so as to hinder the employer and the union in their joint endeavor to adapt the collective bargaining relationship to the exigencies of economic life.^{18/}

In sum, however the standard is phrased, it is essential that unions enjoy the discretion necessary to fashion compromises to difficult as well as simple labor disputes. The nebulous standard adopted by the Fifth Circuit places a union at risk of going before a jury to explain and defend each element of a complex compromise. As a practical matter such a risk will make the negotiation of complex labor settlements much more difficult if not impossible.

^{18/} *Cf. Bowen v. United States Postal Service*, 459 U.S. 212, 225-26 (1983) (federal labor policy is served by employer's ability to rely on union's authority to settle grievances.)

B. The Fifth Circuit Decision Is Premised On A Standard Of Review That Would Leave Every Negotiated Agreement Open To Second-Guessing

The Fifth Circuit acknowledged that a union's responsibilities in bargaining permit the exercise of judgment within a wide range of reasonableness,^{19/} and that a violation of the duty of fair representation is not made out merely because the union "improperly balanced the rights and obligations of the various groups it represents."^{20/} Nonetheless, the Fifth Circuit applied a standard irreconcilable with these premises in concluding that summary judgment had been improperly granted to ALPA. The court summarized its ruling as follows:

We are persuaded that a jury would be entitled to infer that ALPA was arbitrary in accepting the strike settlement if it finds that the union should have expected much more favorable treatment for the pilots had the pilots simply given up the strike effort and offered to return to work. In other words, a jury might reasonably find the union's conduct irrational or arbitrary if the union inexplicably agreed to a settlement that left its members in a substantially worse position than if no settlement had been made.

^{19/} 886 F.2d at 1444.

^{20/} *Id.* (quoting *Freeman v. Grand Int'l Bhd of Locomotive Eng'rs*, 375 F. Supp. 81, 93 (S.D. Ga.), *aff'd*, 493 F.2d 628 (5th Cir. 1974)).

886 F.2d at 1445. This ruling is unobjectionable if understood to mean that any finding of arbitrary conduct (1) must be based on objective facts available to the union at the time of the settlement, (2) require evaluation of the settlement as a whole and its impact upon the affected union members collectively rather than solely upon individuals or sub-groups, and (3) recognizes the propriety of compromise on legal issues in dispute between the parties at the time of settlement. The Fifth Circuit, however, went on to apply its ruling in a manner which demonstrates that the foregoing limitations do not apply.

The Fifth Circuit identified five specific aspects of the settlement that, in its view, a jury could find to be "irrational."

1. "[A] factfinder could infer that ALPA knew that CAL would not have refused to rehire strikers if ALPA had tendered an unconditional offer for the pilots to return to work." 886 F.2d at 1445.
2. "[A] jury could reasonably conclude that if ALPA had unconditionally offered to return the pilots to duty, CAL likely would have returned striking pilots to work according to seniority, and would have permitted strikers to bid for vacancies according to CAL's seniority-based assignment procedures." *Id.* at 1446
3. "[A] jury [could] accept the pilots' evidence that CAL likely would have recognized the returning strikers' seniority rights and privileges if they had unconditionally agreed to return to work." *Id.*

4. "A factfinder could infer that had ALPA unconditionally offered to return the pilots to work, the strikers would have been recalled in seniority order, and would have been able to successfully bid for these vacancies and also preserve their litigation rights against CAL." *Id.*

5. "[A] factfinder might infer that the negotiated division of pilots into strikers and nonstrikers and the subsequent unfavorable discriminatory treatment of returning strikers constituted a breach of the union's duty of fair representation." *Id.* at 1447.

As framed by the Fifth Circuit, these issues invite jury speculation about what might have been, or what would have happened, as well as ad hoc jury evaluation of the trade-offs made by the union in the settlement. These issues also focus narrowly on specific provisions of a comprehensive agreement and ignore the benefits of other provisions not mentioned by the Fifth Circuit. These issues also turn on ex post facto judicial evaluation of the merits of the union's position on pending legal issues rather than on the "wide range of reasonableness" in compromising disputed positions.

The analytical approach adopted by the Fifth Circuit is unworkable for several reasons. First, it permits a violation to be inferred on the basis of an element by element appraisal of the settlement, and its effect on individuals rather than on an evaluation of the settlement as a whole and its effect upon the entire membership. This is directly contrary to substantial precedent that permits a union to trade-off even meritorious positions in

return for other advantages it believes to be of greater collective value.^{21/} Second, it permits the factfinder to speculate with the benefit of hindsight and to substitute its judgment for that of the union in trying to determine what the employer "would have done" or what the union "should have expected." Third, it permits an ex post facto evaluation of the merits of a union's position on disputed legal issues and finds the union culpable for compromise if its position is later viewed by the court - or perhaps the jury - as more likely to have prevailed. Such a blatant opportunity for second-guessing will render most unions incapable of action. As discussed below, viewed in the context in which it was reached and taken as a whole, the settlement constituted a rational, workable resolution of a difficult labor dispute.

II. The Settlement At Issue Here Fell Well Within The Range Of Reasonableness Accorded Negotiated Agreements

A. The Provisions Of The Settlement Constituted A Rational Evaluation Of The Strength Of ALPA's Legal Position

The primary basis for the Fifth Circuit's remand on the duty of fair representation claim is the court's view that

^{21/} See, e.g., *Breininger v. Sheet Metal Workers Int'l Ass'n*, 110 S. Ct. 424, 431 (1989) ("Most fair representation cases require great sensitivity to the tradeoffs between an interest of the bargaining unit as a whole and the rights of individuals."); *Johnson v. Air Line Pilots*, 650 F.2d 133, 137 (8th Cir.), cert. denied, 454 U.S. 1063 (1981); *Buchholz v. Swift & Co.*, 609 F.2d 317, 327 (8th Cir. 1979), cert. denied, 444 U.S. 1018 (1980); *Local 13, Int'l Longshoremen's and Warehousemen's Union v. Pacific Maritime Ass'n*, 441 F.2d 1061, 1067 (9th Cir. 1971), cert. denied, 404 U.S. 1016 (1972).

a jury could find that the order and award "left the the striking pilots worse off in a number of respects than complete surrender to CAL." 886 F.2d at 1445. The undisputed facts, however, reveal that ALPA had good reason to doubt that it could prevail on any of the factual or legal issues cited by the court.

1. *Strikers Had No Legal Right Or Factual Expectation To Return To Work In Seniority Order.* The Fifth Circuit apparently concluded that as a result of the settlement striking pilots lost the right to return to work in seniority order. However, the law is well established that an employer can return strikers to work in any nondiscriminatory manner it desires, and is not required to return strikers to work in seniority order. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 347 (1938); *NLRB v. American Olean Tile Co.*, 826 F.2d 1496, 1499 (6th Cir. 1987); *Lone Star Indus.*, 279 N.L.R.B. No. 78 (1986), *aff'd in relevant part sub nom. Teamsters v. NLRB*, 813 F.2d 472 (D.C. Cir. 1987). Indeed, throughout the ALPA strike, striking pilots who made an unconditional offer to return to work were recalled, if vacancies were available, in the order in which their offers to return were received by Continental. CAL App. at A-12. The settlement agreement continued this consistent practice for those pilots who desired to return to work but elected not to settle their claims (Option 3 pilots). *Id.* Accordingly, contrary to the Fifth Circuit's assumption, the returning strikers had no absolute right to return to work in seniority order upon an unconditional offer to return.

None of what the Fifth Circuit characterized as "strong summary judgment evidence", 886 F.2d at 1445, supports

its conclusion that Continental would have returned the strikers to work in seniority order absent the settlement agreement. The mere fact that prior to the settlement, Continental had applied its standard bidding practices, had honored prestrike seniority, and had recognized seniority accrued during the strike, in no respect provides evidence of any right or expectation that striking pilots would return to work in seniority order. The critical relevant and undisputed fact is that prior to the settlement no striking pilot had returned in seniority order; under the settlement they had that option.^{22/}

2. *Strikers' Legal Rights To Participate In Bid 85-5 Were In Dispute.* A second major defect in the Fifth Circuit's opinion is the court's assumption that, as a matter of law, the returning full-term strikers had the absolute right to bid on all vacancies in bid 85-5. On September 15, 1985, while bid 85-5 was pending, ALPA informed the striking pilots that if they desired to return to work and participate in the bid they could do so without threat of union discipline or harassment, but emphasized that the strike would continue. ALPA issued a press release announcing that this new tactic was a "strategic maneuver." CAL App. at A-9. Continental became aware of statements by ALPA indicating that the returning strikers would act as a "Trojan Horse,"

^{22/} The only other summary judgment evidence referred to by the Fifth Circuit was an alleged discussion in September 1985 between ALPA and Continental in which "Continental indicated that it would honor an unconditional return and recall strikers in seniority order according to their bids." 886 F.2d at 1445 n.3. Because much of the record was sealed by the district court, Continental is unaware of the evidence referred to by the Fifth Circuit. In any event, Continental made no such offer or statement. CAL App. at A-13.

positioning them for future slowdowns, sick-outs and other disruptive tactics. Continental also received reports that strikers were being told to offer to return and submit bids, whether or not they actually intended to abandon the strike and report for training as scheduled, thereby severely disrupting Continental's pilot training program and its ability to staff its future flight schedule. *Id.* These statements and reports gave Continental cause to question the bona fide nature of the bids and unconditional offers submitted by individual pilots between September 15 and 18, 1985. As a result, Continental rejected those offers and bids and filed suit in federal court challenging the legality of ALPA's entire course of conduct. CAL App. at A-73. See *Johns-Manville Prods. Corp. v. NLRB*, 557 F.2d 1126 (5th Cir. 1977), *cert. denied sub nom. Oil, Chem. & Atomic Workers Int'l Union v. Johns-Manville Prods. Corp.*, 436 U.S. 956 (1978) (where safety and integrity of operations may be affected by an in-plant strike or misconduct and the identity of wrongdoers is not feasible, an employer is justified in locking out all employees).

The Fifth Circuit ignored extensive case law,^{23/} including its own prior ruling in a Railway Labor Act case, that a vacancy may be "filled" by a replacement to whom the position had been committed and therefore not be available to a returning striker, even though the

^{23/} See *H & F Bloch Co. v. NLRB*, 456 F.2d 357, 362 (2d Cir. 1972); *LAM v. International Aircraft Services, Inc.*, 302 F.2d 808, 812 (4th Cir. 1962); *NLRB v. Cutting, Inc.*, 701 F.2d 659, 662 (7th Cir. 1983); *Home Insulation Service*, 255 N.L.R.B. 311, 312 n.9, *aff'd without opinion*, 665 F.2d 352 (5th Cir. 1981). See also *Superior Nat'l Bank & Trust Co.*, 246 N.L.R.B. 721 (1979); *Southwest Engraving Co.*, 198 N.L.R.B. 694 (1972); *Anderson, Clayton & Co.*, 120 N.L.R.B. 1208 (1958).

replacement had not yet occupied the position. *National Airlines, Inc. v. LAM*, 430 F.2d 957, 961 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971).^{24/} According to the Fifth Circuit, the strikers' right to positions awarded to working pilots in bid 85-5 flowed from the decision in *ALPA v. United Air Lines, Inc.*, 614 F. Supp. 1020 (N.D. Ill. 1985), *aff'd in relevant part*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987).^{25/} *United*, however, is not on point. In that case, the Seventh Circuit found that certain new hire pilots were not "employees" as that term is defined by the RLA because they had never performed any work for the carrier, a fact that the Seventh Circuit found dispositive of their status. Here, in stark contrast, pilots awarded positions under bid 85-5 had been working for Continental during

^{24/} Continental's long standing practice and policy, dating from prior to the strike, was that a vacancy was filled as soon as a pilot has been awarded it, even if the pilot is not trained for and advanced into the position until months later. A major reason for this policy is the "domino" or "ripple" effect which would be created if assignments were changed once the training cycle has commenced; training which had been done by that time could be wasted, and the scheduling of further training delayed, by the secondary reassignment of all affected pilots to a new "rightful place" on the bid assignments. CAL App. at A-11.

^{25/} The Fifth Circuit also cited *Independent Fed'n of Flight Attendants v. Trans World Airlines Inc.*, 819 F.2d 839 (8th Cir. 1987), *rev'd on other ground*, 489 U.S. 426 (1989), as support for its position. The Eighth Circuit, however, merely adopted the reasoning of the Seventh Circuit in *United Air Lines* and adds nothing to the Fifth Circuit's analysis. This Court's subsequent decision in *TWA* undermined the Eighth Circuit's rationale and refused to adopt that court's "expansive" reading of *Erie Resistor*. While the status of trainees who have never performed any revenue service is not at issue in this case, Continental notes that the Fifth Circuit's reliance upon *United* and *TWA* ignores both the logic and the controlling effect of *National Airlines*, which focused upon the need of both employer's and employees to rely upon commitments of employment.

the strike and it is undisputed that they were employees for purposes of the RLA. Thus, contrary to the Fifth Circuit's assumption, ALPA had not previously prevailed on the issue of whether the returning full-term strikers had any right to bid on the vacancies in bid 85-5 which had already been awarded to working pilots at the time the settlement was reached.^{26/}

3. *The Negotiated Transition Provisions Allocating Captain Positions Did Not Create A Permanent Cleavage.* Section LB.2(c) of the settlement, labelled "Allocations of Vacancies: Transitional Provisions," establishes a formula for allocation of captain positions between working pilots and returning strikers, until the last returning striker was awarded a Captain vacancy -- an event which occurred in 1988. The Fifth Circuit, citing *NLRB v. Erie Resistor*, 373 U.S. 221 (1963), concluded that a factfinder "might infer that the negotiated division of pilots into strikers and nonstrikers and the subsequent unfavorable discriminatory treatment of returning strikers constituted a breach of the union's duty of fair representation." 886 F.2d at 1447.^{27/}

^{26/} There is no suggestion in the Fifth Circuit's opinion that Continental's 85-5 bid was somehow infirm. Given the total absence of any record evidence that the bid was motivated in any part by an improper purpose, there was no basis for any such finding. See *United Air Lines*, 802 F.2d at 899-900. To the contrary, and as ALPA admitted in its petition for writ of certiorari, "[i]t is undisputed that the 85-5 bid was an operational effort by Continental to fill vacancies, in the ordinary course of business under work rules that continued during the strike." Pet. at 25.

^{27/} In *Erie Resistor*, the employer awarded new hires and crossovers 20 years of "super-seniority." The Court held that such conduct "creates a cleavage . . . continuing long after the strike is ended. Employees are henceforth divided into two camps: those who stayed with the union and those who did not." 373 U.S. at 230. (continued...)

In order to reach a settlement, Continental and ALPA agreed to share the Captain vacancies between "working pilots" and "striking pilots" for a limited period on a negotiated formula basis. The compromise also included a fixed timetable for the advancement of returning pilots to Captain positions, including pay guarantees in the event the timetable could not be met.^{28/} It was, as the court describe it, a "dovetailing" of the two groups of pilots, but only for purposes of allocating Captain vacancies;^{29/} in all other respects all pilots exercised their full seniority, thereby entitling more senior returned pilots to their preferences as to monthly work schedules, vacations and similar matters. Striking pilots who returned to work have retained their full seniority relative to crossover pilots and are senior to all pilots hired as permanent replacements.

^{27/} (continued)

... those who returned before the end of the strike and thereby gained extra seniority. This . . . stands as an ever present reminder of the dangers connected with striking and with union activities in general." 373 U.S. at 230.

^{28/} The settlement guaranteed returning strikers 185 Captain vacancies by October 1988. In fact, all returning strikers who desired Captain positions (over 320 pilots in total) were awarded Captain vacancies on the 1987-3 bid awarded in the Fall of 1987, prior to submission of the O'Neill Group's briefs in its appeal to the Fifth Circuit. Thus, the depiction of a permanent cleavage between working and striking pilots in the O'Neill Group's briefs was inaccurate.

^{29/} This allocation method was modeled on an arrangement common in airline mergers, and had previously been used in the 1983 pilot seniority integration following the merger of Texas International Airlines into Continental (which was conducted pursuant to ALPA's published Merger Policy in effect at the time). CAL App. at A-8.

This settlement simply did not create a permanent cleavage in the pilot workforce. By 1987, after all returning pilots had been awarded captain vacancies, thereby concluding the applicability of the settlement's transitional provisions allocating captain vacancies, it was impossible to look at any Continental pilot and determine whether such pilot was a striker or a non-striker. Nor did this compromise prejudice vested seniority rights. To the extent that the settlement's transition provisions did modify Continental's prior procedures in awarding captain vacancies, such a provision was well within the rights of Continental and ALPA to include with a strike settlement agreement. See, e.g., *Gem City Ready Mix Co. & Jack Roberts*, 270 N.L.R.B. 1260 (1984).^{30/} Cf. *Haas v. Darigold Dairy*

^{30/} In *Gem City*, the Board upheld a union's acceptance of a strike settlement agreement allowing three employees who worked during the agreement to be placed on the top of the seniority list, thereby leapfrogging employees who struck.

The policy of the National Labor Relations Act is to encourage the practice and procedure of collective bargaining as a means of resolving labor disputes, including the encouragement of the negotiation of strike settlement agreements. In furtherance of this public policy, the Board long has recognized that statutory rights, including even the fundamental right to strike can be waived . . . it is clear that the Union, with the subsequent concurrence of its membership, waived full prestrike seniority on behalf of returning strikers in return for an opportunity to end the strike and return to work. Under these circumstances, it was satisfactory demonstrated that awarding top seniority to the two nonstriking employees and the strike replacement was [] lawful[.]

270 N.L.R.B. at 1261; see also *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983) (a union and employer may agree to contractual provisions (continued...))

Prod. Co., 751 F.2d 1096, 1099 (9th Cir. 1985) ("Employee seniority rights are not 'vested' property rights which lie beyond the result of subsequent union-employer negotiations."); *Cooper v. General Motors Corp.*, 651 F.2d 249, 250-51 (5th Cir. 1981)(same); *Wheeler v. Brotherhood of Locomotive Firemen & Engineers*, 324 F. Supp. 818, 824 (D.S.C. 1971) (seniority rights may be waived by a union); *Flight Eng'ns Int'l Ass'n v. Eastern Air Lines, Inc.*, 243 F. Supp. 701, 708 (S.D.N.Y. 1965), *aff'd*, 359 F.2d 330 (2d Cir. 1966). In sum, *Erie Resistor* is inapposite in the circumstances here and the Fifth Circuit's reliance on that decision was misplaced.

4. *Continental Did Not Assign The Rank Of A Returning Striker.* The Fifth Circuit also erroneously found that, under the settlement agreement, Continental assigned returning full-term strikers to its choice of rank. 886 F.2d at 1441. This is simply not the case. Analysis of the rejected "Trojan Horse" bids of strikers had showed a concentration of returning strikers in certain bases. Because of Continental's concern about work slowdowns and other disruptions that it feared might result if returning full-term strikers were concentrated in a particular pilot base, Continental negotiated the one-time right to assign each returning striker to his or her initial base and equipment. CAL App. at A-14. In contrast, the rank (and pay) of a returning striker was

^{30/} (...continued) waiving statutory rights). Of course, as discussed, since the settlement here provided that returning strikers would accrue seniority during the strike and while awaiting recall, it was far less onerous to strikers than the strike settlement approved by the NLRB in *Gem City*, which continues to be cited by the NLRB with approval. See *Prentice-Hall, Inc.* 290 N.L.R.B. No. 79 at 65 (1984); *Pioneer Holding Co.*, 291 N.L.R.B. No. 147 at 28-29 (1985).

determined objectively on the basis of available vacancies and on the striker's place in the order of returning strikers. Thus, contrary to the Fifth Circuit's finding, Continental did not have the right to determine the rank of a striker upon his return to work.

5. *Strikers Were Not Required to Waive Wage Claims.*

The Fifth Circuit also erroneously found that the settlement agreement required returning pilots who elected Option 1 to waive all claims against Continental including "claims in bankruptcy for unpaid wages." 886 F.2d at 1441. In fact, under the settlement Continental agreed to pay all pilots 100% of their "hard" claims, which included unpaid pre-bankruptcy wages, medical and dental expenses, other reimbursable expenses, and accrued but unused vacation. No hard claims were waived by any pilot under the order and award. Contrary to the Fifth Circuit's understanding, only "soft" claims, such as claims for contract rejection damages, were waived by certain returning pilots under the settlement agreement. Most of the soft claims filed by pilots had already been denied by the bankruptcy court by the time of the settlement. See, e.g., *In re Continental Airlines Corp.*, 901 F.2d 1259 (5th Cir. 1990).

B. *The Settlement As A Whole Was Reasonable*

By August 1985, ALPA's strike by most measures had failed. Continental had surpassed its pre-strike size, and approximately 1,600 pilots were working, including approximately 400 pilots who had abandoned ALPA's strike and returned to work. ALPA had seen its contract rejected and had been unsuccessful in its litigation against Continental. On the other hand, the pendency of

ALPA's extensive litigation and bankruptcy claims constituted an impediment to Continental's reorganization. Both sides, therefore, had an interest in compromise. Both elected the certainty of settlement, with its hope of future growth for Continental and more jobs for pilots.

Through the settlement ALPA successfully obtained significant benefits for the striking pilots. Perhaps most important, for those pilots who desired to return to work, the settlement agreement provided the option of returning to work in seniority order and made available nearly half the captain vacancies in bid 85-5. The remaining striking pilots were recalled to available first and second officer positions, with a fixed timetable for the advancement of additional returning pilots to captain positions, including pay guarantees in the event the timetable could not be met. The settlement also provided special protection for returning strikers who failed their medical clearance tests or flight training requirements. In addition, the settlement provided that over \$17 million in severance payments were distributed to pilots who did not wish to return to work, and further provided for the final distribution of pension funds. Finally, the settlement provided for the allowance of "hard" bankruptcy claims and for the establishment of an arbitration mechanism for pilots who wanted to challenge their terminations. Without the settlement agreement none of these substantial benefit would have been available to the returning strikers. Thus, viewed as a whole, the settlement was clearly reasonable.

CONCLUSION

For the forgoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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November 15, 1990 CONTINENTAL AIRLINES, INC.

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No. 89-1493

In the
Supreme Court of the United States
October Term, 1990

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,
v.

JOSEPH E. O'NEILL, et al.,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit**

**APPENDIX TO BRIEF AMICUS CURIAE FOR CONTINENTAL
AIRLINES, INC. IN SUPPORT OF REVERSAL**

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DECLARATION OF DONALD J. BREEDING

I, Donald J. Breeding, do hereby swear and affirm as follows:

1. Introduction. I am employed by Continental Airlines, Inc. ("Continental") as Senior Vice President, Flight Operations. I held the position of Vice President, Flight Operations at Continental from 1982 through June 1986. I returned to Continental in my present position in November 1988 and have continued in this position to date. My responsibilities include the supervision of all matters relating to the pilot work force and flight operations of Continental. I previously held the position of Vice President-Flight Operations at Texas International Airlines from 1975 through June 1980, prior to the subsequent merger of Texas International into Continental on September 30, 1982. In October 1985, I served as one of the negotiators on behalf of Continental in the negotiation of the Continental-ALPA settlement which was entered as an "Order and Award" of Judge T. Glover Roberts on October 31, 1985. See Attachment A (as amended). I offer this Declaration to clarify certain facts surrounding the 1983-85 ALPA strike against Continental, and the negotiation and implementation of the Continental-ALPA settlement, in order to identify what I believe to be certain errors of fact and mischaracterizations relating to the Continental-ALPA settlement in the Fifth Circuit panel opinion issued October 31, 1989 in *O'Neill et al. v. Air Line Pilots Association*, No. 88-2848.

2. The Settlement Has Been A Success; All Returned Strikers Now Exercise Full Seniority. The panel opinion expresses concern, at p. 455, that the settlement might be viewed to create a permanent cleavage between strikers and non-strikers. It was, and is, in Continental's interest to avoid

such a cleavage, and to end the bitter strike which had created true cleavage. Continental's paramount concern for the safety of the travelling public, makes it an imperative to achieve harmony in the cockpit between the returning pilots and the working pilots. It is my opinion that the settlement was an enormous success in this regard; the Continental pilots have all conducted themselves as professionals, and the hostilities of the strike, see infra at ¶ 5, have been put behind them. Three hundred forty nine pilots returned to work at Continental under the Continental-ALPA settlement (261 under Option 1 and 88 under Option 3). All of those pilots have exercised their full seniority for bidding purposes at least since the Fall of 1987; 320 of these pilots had been advanced into or awarded Captain positions by October 1988.^{1/} (The remaining pilots either voluntarily elected to bid for lower status positions or did not have sufficient system seniority to hold a captain position of their choice.) Thus, there is no basis at all for concern about the terms of the settlement creating a permanent cleavage.

3. ALPA Organizing Efforts Among Continental Pilots. ALPA has conducted an organizing campaign among active Continental pilots since 1987, including the period while its Motion for Summary Judgment was pending in the district court and while this appeal was ongoing. See Attachment B (ALPA campaign materials). Based upon my experience with ALPA, and the high priority ALPA placed on that organizing

^{1/} Under the settlement, all returned pilots (except those few who had been on furlough status prior to the strike) retained their full pre-strike seniority, utilized that seniority for all purposes other than initial advancement to Captain and exercised such seniority fully in all bids after their initial service as a Captain. Thus, at all times these returned pilots exercised their full seniority for such purposes as bidding monthly work schedules, bidding for vacation preference, and for all other purposes.

campaign, I believe it likely that ALPA tempered its statements and positions in this litigation in light of their potential political impact on the campaign. Moreover, ALPA successfully sought to seal the record of its negotiator's testimony below from exposure to Continental, (Attachment C), and therefore had obvious strategic problems in any attempt to seek the testimony of Continental negotiators, which ALPA failed to do.

4. O'Neill Group Litigation. The O'Neill Group has indicated in filings in other litigation that it is comprised of approximately 250 of the approximately 2,000 pre-strike Continental pilots, primarily pilots who resigned or retired during the course of the ALPA strike at Continental or who elected Option 3 under the Continental-ALPA settlement. The O'Neill Group has pursued at least seven major matters in litigation against Continental since the announcement of the settlement:

(a) objections to Continental's motion to approve the settlement pursuant to Bankruptcy Rule 9019, which were denied by the bankruptcy court's December 27, 1985 Order Approving Settlement. The O'Neill Group's subsequent motion to alter or amend that approval order remains the subject of litigation. See Continental Airlines, Inc. v. O'Neill et. al, Civil Action No. 87-96 (S.D. Tex.), Appeal No. 89-2381 (5th Cir.);

(b) a dispute regarding application of the settlement to "resigned or retired pilots," Continental Airlines, Inc. v. O'Neill et. al, Civil Action No. 87-1092 (S.D. Tex.), Appeal No. 89-2383 (5th Cir.);

(c) a dispute regarding the impact of post-settlement mergers and the addition of "foreign pilots" to the Continental

pilot seniority list. *Continental Airlines, Inc. v. O'Neill et al.*, Civil Action No. 87-1089 (S.D. Tex.), Appeal No. 89-2384 (5th Cir.);

(d) a civil action in district court challenging the Continental-ALPA settlement as in violation of the Railway Labor Act. *O'Neill v. Continental Airlines, Inc.*, Civil Action No. 87-259 (S.D. Tex.);

(e) appeal from the bankruptcy court order denying pilots' bankruptcy claims for contract rejection damages, *O'Neill v. Continental Airlines, Inc.*, Civil Action No. 85-6151 (S.D. Tex.), Appeal No. 89-2347 (5th Cir.), for furlough pay.

(f) appeal from the bankruptcy court order denying pilots banking claims, *O'Neill et al v. Continental Airlines, Inc.*, Civil Action No. 86-3705 (S.D. Tex.), Appeal No. 89-2943 (5th Cir.); and

(g) pursuit of a lawsuit which ALPA had brought against Continental's parent, Texas Air Corporation, and which had been settled by ALPA as part of the Continental-ALPA settlement. *Texas Air Corp. v. Air Line Pilots Association*, Civil Action No. 84-530 (S.D. Tex.), Appeal No. 89-2455 (5th Cir.).

5. Strike-Related Violence And Misconduct. The two-year ALPA strike at Continental was exceptionally hostile and bitter. There were repeated incidents of harassment of passengers and working pilots by striking pilots, including an incident for which two striking pilots were convicted of federal felony offenses for possession of unlawful explosive devices, apparently intended for use in pipe-bombing the homes of certain working pilots. Continental also obtained injunctions against ALPA for harassment of working employees and passengers, and obstruction of access, in Houston, Dallas, San

Antonio, and San Diego. See Attachment D (copies of injunctions). Other strike-related violence included telephone death threats, arson of a working pilot's barn and another's home, the release of noxious odor bombs in Continental airport facilities in Houston and Denver, the jamming of aircraft communications systems, and hundreds of incidents of vandalism to the property of working pilots. Continental believes to this day, and alleged in a 1984 lawsuit claiming violations of the Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C. § 961 et seq., (Attachment E), that this violence was sponsored, coordinated and financed by ALPA through a so-called Security and Intelligence Committee, otherwise known as a "dirty tricks" squad, which operated in secret and received and disbursed ALPA funds under a variety of aliases during the course of the strike, and whose purpose was to intimidate pilots who elected to cross ALPA's picket line, thereby shutting down Continental's operations. ALPA attached such a high priority to the strike that for almost two years it paid extraordinary strike benefits at the rate of \$3800 per month to striking Captains and \$2400 per month to striking First and Second Officers.

6. Bankruptcy Court Findings. The hostility between Continental and ALPA was carried forward in extensive litigation, beginning with ALPA's assertion that Continental had sought bankruptcy court protection for improper purposes. However, after a full evidentiary hearing, the bankruptcy court expressly found that:

Continental Airlines filed this proceeding only when management felt it had no acceptable alternative if it were to have a chance to keep the airline flying; the court further finds that there was no intent or motive to abuse the purpose of the Bankruptcy

Code. . . The primary purpose in filing these proceedings was to keep the airline operating so as to best utilize its going-concern value. The management of the company owed this obligation to its shareholders and to its creditors.

In re Continental Airlines, Corp., 38 Bankr. 67, 71-72 (Bankr. S.D. Tex. 1984). There were also lengthy hearings over Continental's motion to reject the ALPA collective bargaining agreement, which resulted in the following findings regarding the "good faith" bargaining of the parties subsequent to Continental's filing for bankruptcy:

Continental's bargaining position appears reasonable to this court. . . On the other hand, this court is concerned that [ALPA] does not intend to reach agreement with Continental on terms the airline can afford. ALPA appears to have strong motives for seeing that the carrier is shut down as an example to other carriers whose pilots are represented by this large and extremely powerful union. . . ALPA's attitude further seems to be at odds with the spirit and purpose of the Bankruptcy Code.

Memorandum of Authorities Authorizing Rejection of Airline Pilots Association Collective Bargaining Agreements (Bankr. S.D. Tex. Wheless, J.) (entered August 17, 1984) at 14-17.

Attachment F.^{2/} This was the bitter context out of which the Continental-ALPA settlement arose.

7. System Bid 85-5. During the strike, Continental continued its long-standing practice of providing for future pilot staffing and training assignments by means of periodic System Bids.^{3/} Such a bid allocates projected pilot positions among the pilots available for flight duty.^{4/} In order to

^{2/} The bankruptcy court also rejected ALPA's allegations that "safety" was their major concern, finding:

ALPA was singularly unsuccessful in providing a scintilla of evidence to this court that safety is a genuine concern . . . or that there is substantial evidence of unsafe conditions on Continental's airplanes. . . ALPA's campaign is simply a scheme designed to further ALPA's efforts to close down Continental Airlines for its own economic purposes. . . this promotion by ALPA appears to be a misuse of the labor laws of this country.

Attachment F at 19.

^{3/} System Bids have historically occurred at Continental from one to five times per year. In 1985 Continental had 5 System Bids; in 1986 it had one System Bid; in 1987 it had 3 System Bids; and in 1988 it had 2 System Bids. A "System Bid" is a long term pilot training and staffing plan, usually published at Continental four to six months to one-year in advance of its effective date, the deadline by which all pilots would be fully trained and in their new positions. The lead time between an award date and the effective date varies with the amount of pilot re-training expected to be required; each pilot usually assumes his new position as his training is completed.

^{4/} The announcement of a System Bid projects future pilot staffing needs by base (geographic location) equipment (aircraft type) and pilot position (Captain, First Officer, Second Officer). The projections are based on scheduled aircraft deliveries (or dispositions), expected retirements or attrition, and marketing plans for expansion, contraction, or realignment of future flight schedules. Once a System Bid is announced, each Continental pilot "bids" his preferences for base, equipment and status, and the bids are awarded in seniority order, subject to a number of exceptions. The System Bid is then

(continued...)

maintain ongoing flight operations while re-training large numbers of pilots for new positions or equipment, such training must begin from the "bottom-up," i.e. the most junior pilots, Second Officers, must be relieved from active duty (or replaced by trained new hires) in order to be available for training to occupy the seats of First Officers, who then become available to be trained as Captains. A System Bid therefore identifies each pilots' "rightful place" and training requirements, thereby allowing implementation of a training schedule to ensure that each pilot who requires re-training will be trained and in position when needed. The pilot training system is even more complex when multiple aircraft types are involved and the availability of training facilities must also be considered in the scheduling process. Thus, although a particular pilot may not undergo training or occupy his new bid position for some time, his assignment is "locked-in" at the time the bid is awarded because the training and assignment of other pilots is done in reliance on his assignment. The use

4/ (...continued)

"awarded", assigning each pilot to a specific base, equipment and position. Contrary to a premise of the panel opinion, the allocation of vacancies by seniority is not a "fundamental right," but historically a negotiable issue; vacancies at Continental have never been awarded "solely" on the basis of date of hire seniority, but pursuant to negotiated agreements which contain several exceptions to pure date of hire seniority. Those exceptions include (1) a freeze provision, whereby a pilot recently trained as a 727 Captain is "frozen" in that equipment for three years and cannot cross-bid to other comparable equipment which would require retraining; (2) provisions of the Seniority Integration Decision of a neutral arbitrator which merged the Continental and Texas International pilot seniority lists in 1983, which decision included ratio provisions and restricted bidding rights former Texas International pilots from bidding for certain pre-merger Continental equipment types; all based upon a pilot's "expectations" (Attachment G); and (3) the provisions of the Continental-ALPA settlement allocating Captain vacancies and allowing assignment of the initial base and equipment of a returning pilot.

of such bids is absolutely essential to ensure that an adequate number of fully trained pilots will be available to staff future schedules. On September 9, 1985, Continental posted System Base Vacancy Bid 1985-5. This bid, awarded on October 14, 1985, included 186 Captain, 194 First Officer and an undetermined number of Second Officer (due to aircraft acquisition uncertainties) vacancies, and had an effective date of November 1, 1986, the deadline by which all such positions would be occupied.

8. ALPA's Threats Of False Bids And Inside Job Actions. On September 15, 1985, while System Bid 85-5 was pending, ALPA informed the striking pilots that if they desired to return to work and participate in the bid they could do so without threat of union discipline or harassment, but emphasized that the strike would continue. ALPA issued a press release announcing that this new tactic was a "strategic maneuver," stated that its strike of Continental required a "non-traditional response," and further stated that "there is something to be said for having your people back on the property. It opens up new possibilities for achieving a solution once you have your foot in the door." Attachment H. At the same time, Continental became aware of statements by ALPA indicating that the returning strikers would act as a "Trojan Horse," positioning them for future slowdowns, sick-outs and other disruptive tactics. See Attachment I ("Two hundred reinforcements are on their way in . . . we've got our foot in the door and all we have to do now is kick the damn thing down."). Continental also received reports that strikers were being told to offer to return and submit bids, whether or not they actually intended to abandon the strike and report for training as scheduled, thereby severely disrupting Continental's pilot training program and its ability to staff its future flight schedule.

9. Striker Bids Rejected; Bid Awarded. ALPA's threats and the evidence Continental gathered caused Continental to question the bona fide nature of the bids and unconditional offers submitted by individual pilots between September 15 and 18, 1985. As a result, Continental rejected those offers and bids and filed suit in federal court challenging the legality of ALPA's entire course of conduct.^{5/} See Attachment J. See also *Johns-Manville Products Corp. v. NLRB*, 557 F.2d 1126 (5th Cir. 1977) (where safety and integrity of operations may be affected by an in-plant strike or misconduct and the identity of wrongdoers is not feasible, an employer is justified in locking out all employees). ALPA's suggestion of possible false bids to disrupt the training schedule, or other "inside" job actions by returning strikers was an overriding concern to Continental at the time the Continental-ALPA settlement was negotiated in October 1985. The integrity and reliability of its flight schedule and the safety and convenience of the travelling public are the essence of Continental's business; it had a paramount business interest in protecting these interests against compromise by any or all returning strikers in the novel circumstances which existed in the Fall of 1985. System Bid 85-5 was in fact awarded entirely to working pilots

^{5/} Continental was concerned that a heavy concentration of strikers in selected bases and equipment (e.g. Los Angeles 727), would leave Continental's flight operation vulnerable to a job action from within (e.g. if striking pilots "packed" a specific base or piece of equipment, Continental would have no reserves or alternatives if most or all of those pilots elected to engage in a job action). It was ALPA's position at the time that, in the absence of a new contract, the ongoing strike and any other job action was legal. Moreover, I and other members of Continental's management, many of whom had formerly worked at Texas International Airlines, were well familiar with ALPA's use of slowdown tactics, which had to be enjoined there in 1980. See *Texas International Airlines v. Air Line Pilots Association*, 518 F. Supp. 203 (S.D. Tex. 1981). The leader of the TI pilots during that slowdown, Dennis Higgins, was the leader of the Continental striking pilots in September 1985.

(including over 400 previously returned strikers and nineteen strikers whose offers to return were made prior to September 15, 1985). In Continental's view, the positions on Bid 85-5 were properly and finally^{6/} awarded.^{7/} Thus, when negotiations ensued in October 1985, Continental--and the working pilots--were of the view that the positions awarded on that bid were no longer available as vacancies for returning strikers. Continental was fully prepared to vigorously defend its position.

10. Compromise of Litigation Re Bid 85-5. Resolution of the conflicting claims to positions on System Bid 85-5 was a central feature of the Continental-ALPA settlement. In order to reach a settlement, Continental and ALPA agreed to share the Captain vacancies on Bid 85-5 between "working pilots"^{8/} and "striking pilots" on a negotiated

^{6/} It is Continental's long standing practice and policy, dating from prior to the strike, that a vacancy is filled as soon as a pilot has been awarded it, even if the pilot is not trained for and advanced into the position until months later. A major reason for this policy is the "domino" or "ripple" effect which would be created if assignments were changed once the training cycle has commenced; training which had been done by that time could be wasted, and the scheduling of further training delayed, by the secondary reassignment of all affected pilots to a new "rightful place" on the bid assignments.

^{7/} System Bid 85-5 was the subject of litigation which was settled under the Order and Award. *Air Line Pilots Association v. Continental Airlines, Inc.*, Civil Action No. 85-5203 (S.D. Tex.). The O'Neill Group subsequently sought to intervene into that litigation; intervention was denied and the case was dismissed, but was never appealed by the O'Neill Group. Attachment K. In Continental's view, such claims are now barred.

^{8/} The "working pilots" included approximately 200 veteran pilots who never struck and over 400 formerly striking pilots who had previously returned to work. The panel opinion seems to presume, erroneously, that strikers returning under the settlement were necessarily senior to the working pilots

(continued...)

formula basis which included a fixed timetable for the advancement of returning pilots to Captain positions, including pay guarantees in the event the timetable could not be met. In exchange, ALPA agreed to a 1:1 ratio for allocating future Captain vacancies between returning and working pilots. This allocation method was modeled on an arrangement common in airline mergers, and had previously been used in the 1983 pilot seniority integration following the merger of Texas International Airlines into Continental (which was conducted pursuant to ALPA's published Merger Policy in effect at the time). See Attachment G. It was, as the Court describes it, a "dovetailing" of the two groups of pilots, but only for purposes of allocating Captain vacancies; once in their assignments all pilots exercised their full seniority, thereby entitling more senior returned pilots to their preferences as to monthly work schedules, vacations and similar matters. Continental continues to believe that this was not discrimination at all but was a reasonable compromise.

11. Order of Recall. It was Continental's consistent practice throughout the ALPA strike that striking pilots who made an unconditional offer to return to work were recalled, when vacancies were available, in the order in which their offers to return were made, not in seniority order. The Continental-ALPA settlement continued this practice for those pilots who desired to return to work, but who elected not to settle their claims (i.e. Option 3 pilots). See Attachment A at §I.B.1. Those pilots who desired to return to work but elected to settle their claims pursuant to the settlement (i.e. Option 1 pilots) were recalled in seniority order as if they had made an unconditional offer to return as of September 15,

8/ (...continued)

with whom they were ratioed for future Captain vacancies; this was not necessarily true.

1985. Id. The panel opinion suggests that there is some evidence in the record that Continental somehow indicated to ALPA on September 15, 1985 that it would return strikers to work in seniority order if the strike were terminated. I am confident that Continental made no such offer or statement. While the panel opinion points to the post-strike recall of mechanics and flight attendants in seniority order, apparently no party alerted the Court that mechanics and flight attendants are already trained, or easily trained, on all aircraft types and are therefore fungible. Pilots, in contrast are required by FAA regulations to be trained and qualified at substantial expense, for a specific aircraft type. Thus, it would have been in Continental's business interest for Continental to have recalled striking pilots based on their qualifications for available positions. While it was in Continental's interest to re-train such pilots when pilots were scarce and its operations were growing, that would not have been the situation following Bid 85-5 and termination of the ALPA strike.

12. Continental's Pre-Settlement FAA-Approved Pilot Training Manual. The panel opinion correctly notes that the settlement required returning pilots to fly for four months as First Officers before assuming Captain positions. The Court was apparently not made aware that this reflected Continental's pre-existing, Federal Aviation Administration required and approved pilot training program, which included a requirement that any pilot who was absent from a Continental cockpit for more than 24 months had to serve at least four months as a co-pilot before assuming a Captain's position. Attachment L. Under Federal Aviation Regulations, Continental could not have changed that requirement without FAA approval. 14 C.F.R. § 121.405.

13. Continental Did Not Assign Rank or Pay Status. Contrary to the statement in the panel opinion at p. 448,

Continental had no voice or discretion in determining a returning pilots' rank (which determines pay status). Because of Continental's concern about in-plant strikes and work slowdowns, see supra at ¶ 5-6, Continental negotiated the right to "assign" the initial base and equipment (but not the rank or pay status) of any returning pilot in his initial assignment upon return, or in his initial assignment as a Captain. In contrast, the rank of a returning pilot was determined objectively on the basis of available vacancies upon his return and upon the pilot's place in the sequence of returning pilots. Continental's right of assignment for base and equipment was temporary, it expired as to each returning pilot upon the next System Bid following his return to work or following his first service as a Captain. Continental voluntarily waived its right of assignment in the Fall of 1987.

14. No Equipment Freeze Applied To Assigned Pilots. As a Continental representative testified without dispute in bankruptcy court proceedings in December 1986, provisions of the Pilot Employment Policy relating to equipment freezes applied only to pilots who had bid for assignment to new equipment which required training; such equipment freezes have never been imposed upon pilots returning pilots who were assigned to a type of equipment--such pilots were free to bid their seniority on the next System Bid. Attachment M.

15. Severance Payments. The settlement provided a severance option ("Option 2"), which 366 pilots elected. Those pilots received a total of \$17.3 million, an average of over \$47,000 per pilot. Approximately 20 Option 2 pilots received over \$100,000 each, based upon the formula of \$4,000 per year of service. Continental filed two verified reports detailing the amount of severance due to pilots electing Option 2, and served copies of those reports on both

ALPA and the O'Neill Group. Attachment N. Contrary to the statement in the panel opinion at p. 449, the settlement contained no cap on Continental's overall exposure to severance pay. The \$2.6 million "cap" referenced in the Court's opinion relates only to a maximum amount of severance available to a small sub-group of striking pilots, i.e. those pilots "who were not drawing ALPA strike benefits as of September 15, 1985 and were not on furlough status as of September 24, 1983[.]". See Attachment A at § II.A.2 (p. 14-15) (emphasis added). The great majority of striking pilots were receiving ALPA strike benefits as of September 15, 1989.

16. Pilot Wage Claims Were Paid; Not Waived. Contrary to the panel opinion, at p. 448, the settlement also provided that Continental would pay to all pilots, regardless of their option election, 100% of their "hard" claims, which included (1) unpaid pre-petition wages, (2) unpaid pre-petition medical and dental expenses, (3) accrued but unused vacation and (4) reimbursable pre-petition expenses, subject only to a final determination of the amount due by the bankruptcy court. Id. at § II.C (pp. 18-19). The settlement did provide that pilots electing Option 1 or 2 would waive any litigation and other "soft" claims. Id. At the time of the settlement, however, most such claims, including striking pilots' claims for contract rejection damages had already been disallowed by the bankruptcy court. See Orders attached hereto as Attachment O.

I declare under penalty of perjury that the foregoing statements are true and correct.

Executed on November __, 1989.

Donald J. Breeding

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CASE NO.

IN RE: 83-04019-H2-5

CONTINENTAL AIRLINES CORPORATION

DEBTOR

IN RE:

CONTINENTAL AIR LINES, INC. 83-04020-H1-5

DEBTOR

IN RE:

TEXAS INTERNATIONAL AIRLINES, INC. 83-04021-H3-5

DEBTOR

IN RE:

TXIA HOLDINGS CORPORATION 83-04022-H3-5

DEBTOR

CONSOLIDATED CASE NO.

83-04019-H2-5

August 17, 1984

MEMORANDUM OF AUTHORITIES
AUTHORIZING REJECTION OF AIRLINE PILOTS
ASSOCIATION COLLECTIVE BARGAINING AGREEMENTS

On September 24, 1983, Continental Airlines Corporation ("CAC"), Continental Air Lines, Inc. ("CAL"), Texas International Airlines, Inc. ("TXI") and TXIA Holdings Corporation (collectively "Continental") filed simultaneous Chapter 11 proceedings under Title 11 of the United States Code. On the 27th day of September, 1983, Continental filed a motion to reject the collective bargaining agreements with the Airlines Pilots Association ("ALPA"), the Union of Flight Attendants ("UFA"), the International Association of Machinist and Aerospace Workers ("IAM"), and the Transport Workers Union ("TWU").

On the 11th day of October, 1983, the unions filed a joint motion to dismiss the Continental Chapter 11 proceedings on the ground that the proceedings were not filed in good faith; alleging that the sole or the primary purpose of Continental in filing its proceedings was to reject the union contracts. After an extensive hearing, this court denied the joint motion to dismiss.

By agreement of the parties, the evidence introduced at the hearing on the motion to dismiss was included in the record on the motion to reject the employee agreements. The court adheres to the findings made in that decision.

The taking of evidence on the motion to reject commenced on January 30, 1984. This was over four months after these proceedings were filed but was the earliest this court's calendar would permit it to undertake this lengthy hearing. With some interruptions, the presentation of evidence continued until April 27, 1984. At the conclusion of the debtor's evidence, the court took under advisement the motion of the TWU to enter judgment denying rejection of the collective bargaining agreements with the Transport Workers Union. In addition, to some extent, the question of rejection of the various agreements with the IAM is being

treated separately. The court has not yet issued a ruling with respect to the UFA agreements.

Continental shut down its domestic operations at filing but restated them on a substantially reduced basis on September 27, 1984.

Immediately upon the filing of this proceeding on September 24, 1983, Continental Airlines implemented "Emergency Work Rules" with respect to each of the four involved unions. These constituted unilateral changes in pay, benefits, work rules and conditions. On or about that date, Continental transmitted copies of the emergency work rules to each union by a letter indicating that these emergency work rules were just that and that they also constituted an offer to each of the unions to negotiate a new agreement. These cover letters refer to the fact that certain issues were omitted from the provisions in the rules. After receipt of these emergency work rules, ALPA and UFA went on strike (beginning October 1, 1983) without undertaking any negotiations with Continental over the emergency work rules or any new agreement based on Continental's then-existing status. Both of these unions have been on strike since that date; although a number of negotiating sessions have since taken place.

The IAM and Continental had already bargained to an impasse, which was declared effective July 13, 1983. On August 13, 1983, the IAM went on strike; whereupon Continental Airlines implemented "Interim Work Rules" which were subsequently amended on September 12, 1983. These interim work rules were replaced on September 24, 1983, by the emergency work rules applicable to the remaining IAM employees of Continental.

For the reasons set forth below, this court has determined that the equities favor the debtor and its estate, that the contracts with the Airline Pilot Association are onerous and burdensome and that such agreements must be rejected in order for Continental to have an effective reorganization. This rejection is pursuant to the provisions of 11 U.S.C. § 365 and under the principles enunciated in the case of *NLRB v. Bildisco and Bildisco*, 104 S. Ct. 1188 (1984) decided February 22, 1984, during the evidentiary presentation in this case. That case was decided under the National Labor Relations Act. This court determines that the same reasoning and rationale are applicable to this case, which is decided under the Bankruptcy Code and the Railway Labor Act, 45 U.S.C. 151, et seq.

FACTS

Effective in 1978, the United States Congress, in its wisdom, determined that the airline industry should be deregulated to promote greater competition with respect to routes and fares, to allow more ready access of new entrants into the industry and to add flexibility of all airlines to enter new and existing markets and to charge what the traffic would bear, so to speak. Congress took this action despite the protests of the existing airlines, ALPA, the IAM, and other interested parties, who predicted that deregulation would result in financial difficulty for many of the carriers and bankruptcy or mergers for some and that this would cause displacement of many employees.

The aims and goals of the U.S. Congress in deregulating the airline industry appear to have been realized. Airfares have decreased dramatically in areas where the particular airline involved has not had substantial control over the market. Many new airline companies have entered into the marketplace and now compete directly with Continental

Airlines and the other airlines in the industry. In order to offset this increasing competition, Continental sought to increase its marketing efficiency by resorting to a "hub and spoke" operation; utilizing Denver and Houston as its operational hubs. While this has had some substantial beneficial effect on Continental's operations, this benefit was not sufficient to offset the fare advantages resulting from lower labor costs enjoyed by the new entrants in Continental's market. The lower labor cost of these new entrants resulted from the lack of historically based labor agreements which had escalated during the regulated period, before 1978, when the airlines could pass these increased costs on to the consumer. In this regulated atmosphere of the airline industry pre-1978, the self preservation instincts of the carriers were mitigated against and they thus did not have adequate incentive to resist the persistent and determined negotiating techniques of the powerful unions in the airline industry, such as ALPA and the IAM.

These unions have historically (and effectively) used the last highest contract as a stepping stone for each new negotiation. The result has been higher and higher wage rates and better and better provisions for the employees relating to work terms. There is no question that these unions did an outstanding job on behalf of their membership in this regard. This trend of higher and higher labor costs (negotiated by these unions) continued even after deregulation by virtue of these same techniques. No doubt upward inflation during this same time was a factor in these negotiations. The result, however, was a complex system of work rules which operated less and less efficiently for the airlines but which generated more and more time off and higher pay for the members of these unions. The additional and more unfortunate result was that it made a high and inflexible labor cost system for the major carriers coming out from the nurture of regulation. This caused many of them to be less competitive with the new

entrants who were making increasing incursions into their markets.

This was particularly true of Continental Airlines, whose hub systems in Denver and (particularly) in Houston competed directly with many of these new entrants. Not being fettered with the expensive and inefficient collective bargaining agreements of the older airlines, these new entrants^{1/} could hire pilots, mechanics, and flight attendants in the open labor market at substantially lower prices than those that had been negotiated by Continental's labor unions. Labor is a major factor in the cost of operating an airline and is one in which there can be material variances from airline to airline. These new entrants could charge substantially lower fares than the older more established airlines, and their cheaper labor costs gave them a substantial competitive advantage over other airlines, including Continental. Continental did not have substantial control over its markets and does not now.

^{1/} Southwest Airlines had not been subject to regulation because it was an intrastate carrier before deregulation. Its labor costs have been traditionally lower. Thus while Southwest is not a "new entrant" in some respects, it is in others, since it has materially expanded its markets since deregulation. Its labor costs have been low, and it has run Continental out of at least one market with its lower fares. It is highly competitive with Continental in other markets. For convenience it will be included within the term "new entrants" in this opinion.

As a result, Continental lost substantial sums of money after deregulation. Up to September 24, 1983, the date of filing of the Chapter 11 petition, Continental had lost \$521,900,000 as follows:

1979	lost \$	27.4 million
1980	lost	76.8 million
1981	lost	138.6 million
1982	lost	119.9 million
1983 to September 24	lost	<u>159.2 million</u>
		\$521.9 million

Although there were other factors, the main cause of Continental's losses was, as noted, that its higher labor costs prevented it from effectively competing with the low cost new entrants which have been significantly increasing their activity in Continental's markets. Continental did not have the benefit of some of the advantages enjoyed by some of its larger competitors such as United Airlines and American Airlines.

An expert employed by the Trade Creditors Committee testified that all of the major airlines are seeing "the handwriting on the wall" and are negotiating, or have negotiated, important concessions with their respective labor forces. Some have obtained significant reductions in their labor costs from those stipulated by their existing collective bargaining agreements. It was forecast that unless the major carriers eventually reduce their labor costs to the level of the new entrants, they will not survive.

Continental negotiated from time to time during the year of 1983 attempting to obtain concessions from its various unions.

During its disastrous summer of 1983, and prior to filing its Chapter 11 proceeding, Continental Airlines attempted to

negotiate a \$60,000,000 cost concession from the Airline Pilots Association (on an annual basis) and sought a \$40,000,000 annual concession from the Flight Attendants, \$20,000,000 from the International Association of Machinist and an additional \$30,000,000 from its other (non-union and managerial) employees.

While the Airline Pilots Association members indicated that they were "players", nevertheless, they never committed to the requested \$60,000,000 in cost concessions nor to any other number prior to the filing of the Chapter 11 proceeding. After the filing, ALPA offered concessions of approximately \$30,000,000 on an annual basis, or about half what Continental had indicated it needed from the pilots to break even before the filing of the Chapter 11 proceeding.

After the filing, Continental immediately cut back on a number of its routes and a substantial number of the flights that it had been flying. It shut down the airline from September 24 until September 27, 1983, except that it continued to fly its international routes for fear these lucrative concessions might be lost. Continental was also fearful of the domestic flights being shut down for any longer period. Its position is that it was concerned that it would lose public acceptance and that it might never fly again; at least most certainly not without substantial cost to creditors, shareholders, and all concerned, including employees.

Continental scaled back its cost structure in order to provide high quality service on a fare structure competitive with the new entrants. It appears to have been somewhat successful at this marketing technique to date; although it is not yet known what effect there will be if a full scale fare war should be engaged in by a substantial number of its competition. Nor is it known what the full effect of additional competition will be from carriers now entering the field,

including the "New Braniff", which began flying during the spring of 1984 during the evidentiary presentation in this case.

REASONABLE EFFORTS

The Supreme Court in *NLRB v. Bildisco and Bildisco*, supra, (hereinafter "Bildisco") required that before acting on a petition to "modify or reject" a collective bargaining agreement, the bankruptcy court should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution. The purpose of this is to serve the policies (if not the letter) of the Labor Act^{2/}. However, the bankruptcy court is not required to determine that the parties have bargained to impasse nor to make any other determination outside the field of its expertise.

The unions assert that the involved principle requires the bankruptcy court to hear evidence and pass on the substantive details of all relevant negotiating sessions. This is part of an effort to show that Continental acted unreasonably in the substance of its proposals to the respective unions. The thrust of this theory is to place the bankruptcy court in the posture of determining what the parties should agree to and in what respect the company offers vary from this standard.

It is precisely this kind of inquiry which this court understands that *Bildisco* (and prior cases) determined that this court should avoid. *Bildisco* pointed out that the national labor policies of avoiding labor strife and encouraging collective bargaining generally require that employees and unions reach their own agreements on terms and conditions of

^{2/} In that case it was the National Labor Relations Act ("NLRA") 29 U.S.C. 158 et seq. This case involves the Railway Labor Act ("RLA") 45 U.S.C. 151 et seq.

employment free from governmental interference. In addition, the Court observed that a determination that the parties have bargained to impasse is one ordinarily made by the National Labor Relations Board and that to involve the bankruptcy court in that kind of determination would divert the bankruptcy court to an area outside its area of expertise. See also *American National Insurance Co. v. NLRB*, 187 F.2d 307, page 310 (5th Cir. 1941), affirmed 343 U.S. 395, page 404 (1952).

The labor agreements with ALPA, UFA & IAM are complex and the resulting cost of virtually each provision is difficult of ascertainment, partly because it varies substantially with each level of flying operation. Asking this court to pass on the merits of the respective offers would impose on the bankruptcy court a substantial burden in areas far removed from any expertise this court might have.

It is the opinion of this court that it is not intended by the Supreme Court that the bankruptcy court examine the substantive merits of the negotiations to determine whether the parties respective proposals are reasonable but rather only that a genuine effort has been made to reach agreement with the certified representatives of the employees. In the same phrase, the Supreme Court required this court to determine as well that "such efforts are not likely to produce a prompt and satisfactory solution." In other words, if a genuine effort has been made by the debtor to reach agreement and this effort is not likely to produce a prompt solution under all the existing circumstances, the court is authorized to act on the debtor's motion to reject. Of course, this duty of the debtor to recognize the bargaining representative and to continue bargaining exists both before and after any rejection is permitted.

The *Bildisco* court avoided using the terms "good faith" and "bad faith" bargaining; traditional terms in labor negotiations and labor law. Presumably this was intentional. Perhaps this is an indication that the Supreme Court intends for the Bankruptcy Court to stay out of even that area of determination. The "good faith - bad faith" determination is simply a determination of whether or not a party has a desire to reach an agreement at all. It requires some assessment of the substantive terms of an offer, as well as the willingness to bargain and the effort to do so. *NLRB v. Herman Sausage Co.*, 275 F.2d 229 (5th Cir., 1960). However, even a "good faith - bad faith" determination is far less of an intrusion into the bargaining rights of the parties than a determination of whether the substantive terms of a proposal are "reasonable".

The Supreme Court has noted that great caution should be used in finding bad faith in cases other than wherein there is a "desire not to reach agreement", for doing so risks infringement of the strong federal labor policy against governmental interference with the substantive terms of collective bargaining agreements. *Chicago & Northwestern Railway v. United Transportation Union*, 402 U.S. 570 (1971). The Fifth Circuit has ruled to similar effect in many cases, including *Gulf State Manufacturing, Inc. v. NLRB*, 579 F.2d 1298 (5th Cir. 1978), aff'd in pertinent part 598 F.2d 896 (5th Cir. 1979) (en banc).

In addition to this strong policy against such determinations by a court, the burden on the bankruptcy court to make an inquiry into the reasonableness of the terms of offers (as suggested) would appear to be excessive. This court has allowed this type of evidence in this proceeding because of some of the uncertainties in the law that existed at the time of this hearing. The result has been that the hearing lasted almost three months. No doubt future case law will give the Bankruptcy Courts guidance with respect to this issue as to

future hearings on applications to reject collective bargaining agreements.

Be that as it may, this court allowed detailed evidence concerning the substance of numerous bargaining sessions which occurred both before and after the filing of the Chapter 11 petition on September 24, 1983. This was at a great cost of court time and may have consumed as much as half or more of the hearing time. From this evidence, the court concludes (1) that Continental has made considerable and reasonable effort to reach agreement with the unions involved herein for voluntary modification of their respective bargaining agreements, (2) that Continental has bargained in good faith with respect to those efforts, (3) that no agreement has been reached and (4) that those efforts are not likely to produce a prompt and satisfactory solution. It is the intention of Continental to reach agreement with these employee groups consistent with its current economic situation. It has made numerous attempts to do so.

That Continental continued to urge in its bargaining session that it must maintain its labor cost levels at or about those provided for in the emergency work rules does not constitute bad faith negotiation under all of the circumstances of this case. It is not bad faith for a party to insist on the terms of a proposal and to maintain that posture. "Open mind need not mean a mind without conviction nor need it mean a mind easily swayed by argument." It need not make a proposal or require the making of a concession. *American National Insurance Co. v. NLRB*, supra, page 309.

A party may try to achieve its objectives and need not yield. *NLRB v. Tomco Communication, Inc.*, 567 F.2d 871, 884 (9th Cir. 1978). It may even withdraw an earlier offer, including a tentative agreement on certain provisions, if circumstances change. *NLRB v. Randle-Eastern Ambulance*

Service, Inc., 584 F.2d 720 (5th Cir. 1978). A position taken in good faith need not be abandoned or compromised. The debtor is entitled to insist on a proposal, however unacceptable to the union, and if the insistence is genuinely and sincerely held it may be maintained even if it procures a stalemate. *NLRB v. Herman Sausage Co.*, 275 F.2d 299 (5th Cir.), rehearing denied 277 F.2d 793 (5th Cir. 1960), see *American National Insurance Co. v. NLRB*, supra, page 309 n.3.

The unions' position that a party must ask for more than it wants in order to meet somewhere in the middle is not accepted by this court. That was urged as being the traditional method of negotiating. However, the facts in this case show that this is not the traditional situation facing negotiators. This is especially true where, as here, Continental has been in extreme financial difficulty and needed prompt modification of its collective bargaining agreement.

Having just filed a Chapter 11 proceeding and being the first air carrier to attempt to fly through such a proceeding, Continental was in a period of uncertainty and needed the flexibility allowed it by the so called emergency work rules promulgated September 24, 1983, immediately upon filing the proceeding. As noted, Continental substantially cut back on the number of cities it served and the number of flights to the cities it continued to serve. It substantially reduced its work force. At the present time it is facing increasing competition from even additional new entrants coming into the market since the filing of this proceeding. It is just now approaching profitability but may be faced with a fare war in the near future. Under the existing circumstances, Continental's bargaining position appears reasonable to this court. Although it severely cut back the wage levels and liberalized its working rules, it somewhat patterned these after those of other airlines with which it was then in competition. Over half of the union

membership in each category has crossed the picket lines and come to work for Continental under the terms of the emergency work rules (eighty percent in the case of Flight Attendants) as have newly hired personnel^{3/}.

In *Neon Sign Corp. v. NLRB*, 602 F.2d 1203 (5th Cir. 1979), the Fifth Circuit found that an employer engaged in good faith bargaining even though it insisted on wage decreases. The company was experiencing serious financial problems and lower wages were essential to its survival.

That the proposals submitted by the company were for provisions similar to those agreed to by the same union at other companies is evidence of the employer's good faith. See *NLRB v. American National Insurance Co.*, 343 U.S. 395, 405 (1952); *Gulf State Manufacturers v. NLRB*, supra.

That the unions have not accepted Continental's proposals does not in and of itself mean that they are unreasonable or that they are not attempting to reach agreement with Continental. Indeed, the concessions that are being asked of the pilots, the flight attendants, and others is substantial and greatly affects a standard of living to which many of them have become accustomed. This is a difficult idea to adjust to. Nevertheless, herein, the purposes of the National Labor policy have been well served. Bargaining by the debtor with its unions has been going on for well over a year. No agreements could be reached with the IAM and an impasse was declared. No agreement has been reached with ALPA or UFA.

^{3/} Some of the jobs subject to the IAM agreements were eliminated because Continental could (and did) contract these services out to third parties at cheaper rates than the IAM contract specified (i.e., cabin cleaners, fuelers, flight kitchen personnel, etc.).

Prior to September 24, 1983, the terms offered the respective unions were better than those required by the debtor post filing. Yet no agreement could be reached on those terms. Just before filing, Continental made major presentations directly to its employees in order to reach agreement on concessions which this court finds were necessary for it to survive, but the unions (except TWU) did not agree. A great deal of negotiation has taken place since filing. To require further bargaining at this level before acting on the motions to reject seems to this court to be unrealistic and useless.

Indeed, the failure of the court to act at this stage of the proceeding (two months after the substantial evidentiary hearing concluded) may be impeding eventual agreement. As noted above, the parties have a continuing duty to bargain even after rejection. If agreement is to be reached, it will occur after the issue of the rejection of the agreements has been determined. Perhaps this and the improving income posture of the debtor will allow agreement to be reached in the future.

On the other hand, this court is concerned that the Airline Pilots Association does not intend to reach an agreement with Continental on terms the airline can afford. ALPA appears to have strong motives for seeing that the carrier is shut down as an example to the other carriers whose pilots are represented by this large and extremely powerful union. It represents pilots throughout the airline industry in the United States. Other carriers are having difficulty in the post-deregulation period and are requesting concessions from their pilots. The obligations of ALPA to its other (non-Continental) members would make it difficult for this union to recommend settlement with Continental to the extent needed by Continental in order to lower its labor cost sufficiently for it to be competitive in its fare levels and to return to

profitability. Outside of the courtroom, ALPA has asserted "we must continue to apply whatever pressures are required to preclude New CAL [from] operating profitably. These pressures will include both economic sanctions and all legal action open to us. . . ." In the courtroom, ALPA has verified that its purpose is to shut down Continental. The Airline Pilots Association has made it clear, and has convinced this court, that its primary aim is to shut down Continental Airlines.

While ALPA's actions (to the extent they are legal) may be allowed by prevailing labor laws, wherein they are a means to achieve an agreement, it appears to this court that other motives are involved, at least in part. Thus ALPA's actions to shut down Continental and/or to deprive it of profitability reflects on ALPA's good faith in bargaining and on any equities involved. ALPA's attitude further seems to be at odds with the spirit and purpose of the Bankruptcy Code.

ALPA has maintained that its three principal areas of concern are (1) preservation of the union as the bargaining representative of Continental's pilots (union security), (2) safety and (3) seniority. It also contends that Continental has bargained unreasonably by failing to agree with ALPA's proposals.

Continental has at all relevant times recognized ALPA as the bargaining representative of its pilots, although it has not honored the "dues checkoff" provision of the collective bargaining agreement since the strike began.

THE "SAFETY" QUESTION

The evidence in this case shows that ALPA has publically indicated that it and its members are vitally concerned with the safety of the public flying on Continental Airlines since the October 1, 1983 strike. The pilots failed to mention that most of the pilots employed by Continental are those off of ALPA's seniority list (i.e., are ALPA pilots). The newly-hired pilots must go through required training and must be qualified. That some may be less experienced does not of itself indicate lack of ability. In addition, the court would note that safety is the responsibility of the Federal Aviation Agency, who must revoke or suspend the certificate of Continental Airlines should Continental not adhere to the safety standards imposed by this federal agency.

In short, while crying "Safety! Safety!" in the courtroom and to the public, ALPA has filed in its meager attempt to offer evidence that Continental Airlines is unsafe to fly. It has offered almost no evidence of this to this court, and has apparently failed to convince the FFA, in whose jurisdiction and responsibility lies the safety of all airlines, including Continental.

ALPA was singularly unsuccessful in providing a scintilla of evidence to this court that safety is a genuine concern on the part of the pilots or that there is substantial evidence of unsafe conditions on Continental's airplanes^{4/}.

4/ Were ALPA genuinely concerned over the public's interest, it has it within its power to release some of its striking pilots back to Continental to help fill its pilots needs. Continental has requested this. It would have prevented further erosion of Continental's seniority list - an issue in the settlement negotiations. ALPS is under no obligation to do this but its failure to do so upon request is indicative of the fact that self interest is its true motive in this endeavor; not that of the public.

This court has concluded that ALPA's campaign is simply a scheme designed to further ALPA's efforts to close down Continental Airlines for its own economic purposes. Among other things, this would act as a warning to other carriers who must deal with ALPA at the bargaining table in other areas.

Based on the evidence offered to this court, this promotion by ALPA appears to be a misuse of the labor laws of this country. In any event, the court declines to deny rejection on the basis of ALPA's claim that safety is at stake.

THE SENIORITY ISSUE

Some of the major provisions of the collective bargaining agreements by and between Continental Airlines and the Airline Pilots Association (including the old Texas International agreement with ALPA) relate to seniority. These are very sensitive and important provisions for the pilot employees (as well as the other union employees with respect to their respective collective bargaining agreements). ALPA and the other unions argue that Continental Airlines has not been reasonable in its efforts to settle because of Continental's position with respect to the relative position of "new hires" that have been employed since the pendency of this proceeding and after the strikes of Continental's major unions, including ALPA.

The unions further argue that the seniority provision of the contract is a non-executory right which has become "vested" in the pilots and therefore cannot be rejected under the provisions of § 365 of the Bankruptcy Code. This court disagrees.

There is no precise definition of "executory contract" in the Bankruptcy Code. At least one of the accepted

definitions of the term "executory contract" is a contract that is so far unperformed on both sides that the failure of either party to complete performance would constitute a material breach excusing further performance of the other. *Matter of Tonry*, 724 F.2d 457 at page 468 (5th Cir. 1984). See *Countrymen, Executory Contracts and Bankruptcy*, 57 Minn. L. Rev. 439 (1973); 58 Minn. L. R. 479 (1974) and House Report No. 95 - 595, page 347 (1977); Senate Report No. 95 - 989, 2d Sess. 58 (1978), 2 Collier on Bankruptcy § 365.02 (1983).

Even though a pilot may have achieved a certain level of seniority within the meaning and under terms of the collective bargaining agreement between ALPA and Continental, nevertheless, the right of employment at Continental by any particular pilot is not absolute. In order to enjoy the use and benefit of any seniority position, the pilot must be employed by, and perform services for, Continental Airlines. It is therefore clear that under the collective bargaining agreement both Continental and each employed pilot have reciprocal obligations during the life of the contract. In other words, performance is due by both parties. This is likewise true for every other employee that has seniority under a collective bargaining agreement. Thus, under the Bankruptcy Code, such a provision is executory, at least insofar as the right of a striking pilot to return to work after the strike is settled.

Under the Continental - ALPA collective bargaining agreements, pilots were entitled to be placed on the seniority list and to maintain their relative status thereon (absent other agreement) under the terms and conditions of the agreement. As a pilot went higher on the seniority list, he had the privilege of being recalled, or his employment maintained, in priority to pilots lower on the seniority list. In addition, as changes were made in the system such as routes, equipment, bid runs, vacations, etc., the higher the seniority the higher the

priority for the pilot to have his choice in these areas. Furloughs were made from the bottom of the seniority list. Further, after pilots are furloughed, under the agreement they were recalled in order of seniority. Often this required extensive retraining by Continental, wherein a pilot changed type of equipment or was out of service beyond a specified amount of time.

When Continental filed its proceeding and drastically cut back on the number of cities it served and the routes it was flying to the remaining cities, Continental had to furlough a number of pilots on the payroll. Continental immediately went on a campaign to get the remaining pilots to agree to fly under the emergency work rules. Once the strike began on October 1, 1983, Continental maintained a telephone "bank" in which pilots were called and requested to fly for Continental notwithstanding the strike. Those that did return to work filled the positions then available and, once recalled, maintained their relative priority they enjoyed on the seniority list pre-petition. Therefore, the relative seniority of working pilots is not the issue as this seniority is being honored by Continental.

For a period of time after the strike, Continental attempted without success to reach agreement with ALPA on the terms of a new collective bargaining agreement. As the early initial chaotic days of filing passed and Continental began to rebuild its system, Continental needed additional pilots and made a strenuous effort to get striking pilots to return to service. There was some success in this area, but as Continental expanded its routes it was unable to fill out its list of needs from the ALPA pilots then on strike. By instructions from its chief operating officer, Continental delayed hiring pilots not on the seniority list ("new hires") until it felt it had to do so to service its re-expanding route system. Continental did not undertake employing new hires

(pilots off their existing seniority list) without adequate warning to the Airline Pilots Association and its membership. ALPA was told on October 5, 1983, that replacements would be hired if the strike was not over quickly, and Continental sent letters to this effect to all of its pilots. Continental told all of its active pilots that it would not displace working pilots in the future to accommodate returning strikers. Striking pilots had the opportunity to return to work with Continental as it expanded its operations, but many declined to do so, although more than 50% of its pre-petition pilots did return to work.

After Continental reached the conclusion that it had to employ new hires, and began doing so in early November, 1983, it advised these new pilots that they were permanent and would not be replaced by striking pilots returning to work at Continental after the strike ended or upon each striking pilot's individual decision to cross the picket line. That permanent replacements would be hired if the striking pilots would not return was well known to ALPA and its membership long before Continental undertook this practice. Subsequently, since early November, 1983, as pilot positions were available in the system, Continental has hired all pilots off the seniority list who were willing to return (which pilots have continued to enjoy their relative seniority position) and has hired new pilots from outside its seniority list. As noted, once employed, the seniority system has functioned for each pilot as it did before the filing of these proceedings. As noted, once employed, the seniority system has functioned for each pilot as it did before the filing of these proceedings. Had Continental not employed pilots who were not on its seniority list the airline would have had to significantly limit its operations. This would have served ALPA's purposes but it would have made Continental's ability to reorganize substantially less likely. It was necessary to hire these

replacements in order for Continental to discharge its duty to the public to make a reasonable effort to continue flying.

However, in efforts to negotiate a settlement, ALPA has pointed its finger at Continental for refusing to agree on a "back to work" agreement under which the striking pilots would return to work and would resume their old relative seniority positions ahead of any newly-hired pilots (who would naturally have lower seniority status in most, if not all, situations). Such an agreement would result in Continental's furloughing most, if not all, of these new hires, despite express promises to these individuals that they would not do this. ALPA says that Continental, by not so agreeing is bargaining in bad faith and/or is unreasonable.

Continental has maintained that it will take returning pilots only to the extent that positions are (or become) available and will not agree to "create" positions for returning strikers by furloughing new hires.

Continental defends its position by urging to the court that it has a legal obligation (the oral representations and agreement) to the individual new hires as well as a moral obligation. Continental further argues that if it agreed as ALPA has suggested, the resulting furloughs of the new hires would put Continental in a bad bargaining position with respect to any future negotiations that might take place between ALPA and Continental within the next several years. Continental argues that its position does not constitute bad faith bargaining and is entirely reasonable under the circumstances.

Should an agreement be reached with ALPA, it is doubtful that it would extend beyond a one or two-year period, as has been customary between these parties. Many of these new hires left, or declined to accept, other employment

positions when they came to work for Continental. It would appear that they have relied upon Continental's representations. If Continental replaces these permanent new hires despite its representation to the contrary, Continental might well be at the mercy of ALPA at the end of any new contract term because of its potential inability to employ replacement pilots should ALPA then undertake a new strike. Continental would have effectively lost credibility with the pilot community in this country, risking the probability that it could not hire replacement pilots in the event of any future strike threat. For Continental to agree as ALPA suggests would place a powerful negotiating weapon in ALPA's hands with respect to future negotiations. In this court's opinion, given all of the circumstances of this case, Continental has valid reason to be concerned over the use of such weapons by ALPA. In all probability, Continental will not have completed any reorganization process within the next two, three nor even five years^{5/}. The resulting leverage to ALPA could place in jeopardy any confirmed plan or arrangement.

The strong public right of the worker to engage in a legal strike must be observed. However, the working pilots (including those not on the pre-petition seniority list) and the other working employees have done what they can to preserve the value of the debtor for the benefit of all. Once successful reorganization is achieved or is foreseeable, can the striking employee be heard to claim that Continental is unreasonable in not agreeing that the striking employee may return to work whether a position is available or not and demand his or her former seniority status as a legal right, when it results in the new hire being furloughed?

^{5/} By this is meant the completion of any payout period provided for in a confirmed plan of arrangement. It is not unusual for such pay periods to extend beyond three or even five years.

This court cannot agree that a policy such as ALPA suggests would be in the best interest of the reorganization process.

Although any "legal" and/or "moral" obligation of Continental to the new hires is an important factor, in this court's view there is a much stronger reason for sustaining Continental's position that these needed new hires are now permanent employees and that they should not be replaced by Continental to create positions for returning striking pilots as part of any back-to-work agreement. These reasons are the public policy of keeping the air carrier flying (as provided in the Interstate Commerce Act and in the Railway Labor Act) and in the equally important public consideration and policy of the Bankruptcy Code that a financially troubled company make the highest and best use of its assets and facilities in order to maximize the recovery to creditors and to preserve the business operation for the economy of the country. It is not the least of such policy that it promotes the preservation of this particular job market.

The striking pilots made a choice, although it was no doubt a hard choice. When one makes a choice, it is not always possible to continue to retain both options, and in fact usually this is not the case. When great principles conflict, a court must attempt to determine what the best overall public policy must be under the circumstances. These striking pilots made their decision knowing the potential consequences. They were aware that Continental was asking them to return, that Continental needed pilots to expand its operations, a necessary step if it was to have a successful reorganization, and that Continental was going to hire replacement pilots on a permanent basis if they did not return, and that Continental would not voluntarily allow displacement of these persons who accepted employment under extremely troubling circumstances.

A reorganizing debtor must be efficient in its employment practices, since its ability to survive is at stake. It would not be consistent with the overall purposes of the Railway Labor Act and/or the Bankruptcy Code to thusly penalize the new hire after he has been successful in assisting the debtor to return to profitability.

Certainly Continental needed to give assurance to these new hires that they would not be replaced when the strike was over. No one knew how long the strike might last. This emphasizes (and is consistent with) the strong public policy of the Railway Labor Act to keep the carrier in operation. When you couple this public policy with the circumstances that the carrier in this instance was in a weak financial condition, one must conclude that while the union is free to use self-help under labor law, the debtor likewise had the right to use self-help as Continental did here. There is legal precedent for the position taken by Continental. *Empresa Equatoriana De Aviacion v. District Lodge*, 690 F.2d 838, (8th Cir. 1982); *National Airlines, Inc. v. International Association of Machinists and Aerospace Workers, et al.*, 416 F.2d 998 (CA 5, 1969) cert. denied, 400 U.S. 992 (1971); *Flight Engineers International Association v. Eastern Airlines, Inc.*, 359 F.2d 303 (2nd Cir. 1966); *International Association of Machinists v. Central Airlines, Inc.*, 355 S.W.2d 803 (Civ. App. Texas, 1962) cert. denied, 371 U.S. 934 (1962), reh'g denied, 371 U.S. 970 (1963).

In the case of *Flight Engineers International Assoc. v. Eastern Airlines, Inc.*, supra, ALPA itself successfully espoused the position that its members should permanently replace striking flight engineers.

In *National Airlines, Inc.*, supra, page 1006, the court stated: "Under both the N.L.R.A. and the Railway Labor Act, a carrier need not discharge those hired to replace strikers.

The hiring of replacements for the strikers would have been consistent with the attempt to restore service." In *Empresa Equatoriana*, supra, the court stated on page 846 that "the carrier could replace strikers where necessary to its operation." On page 847 it said: "The strikers who were properly replaced are entitled to be placed on such [a preferential hiring] list, to be rehired when their replacements quit or when a similar vacancy arises. Without the hiring preference, the concept of replacement becomes indistinguishable from discharge."

The hiring of permanent replacement employees in a strike situation has been held to be an acceptable practice under the National Labor Relations Act. In *NLRB v. Mackay Radio and Television Co.*, 304 U.S. 333 (1938), the Supreme Court held that permanent replacements hired in an economic strike need not be terminated to make room for returning strikers. On page 345, the court said it is not "... an unfair labor practice to replace the striking employees with others in an effort to carry on the business" and that an employer is "not bound to discharge those hired to fill the places of strikers upon the election of the latter to resume their employment in order to create places for them." See also *Gulf States Manufacturers, Inc. v. NLRB*, supra, page 1327 and 1328.

To require the debtor to place in effect at this time rules which would cause the termination or furlough of these people who have made a vital contribution to the effort to reorganize, would in this court's opinion, serve as a bad precedent for future reorganization cases.

While Continental is free to make the choice of agreeing or not agreeing with ALPA on this point, this court declines to accept ALPA's view that Continental has engaged in

unreasonable bargaining (or bad faith) in refusing to accept ALPA's position on this point.

**THE STATUS QUO PROVISIONS OF THE
RAILWAY LABOR ACT, THE EMERGENCY WORK RULES,
AND REJECTION OF THE CONTRACTS AND THEIR TERMS**

As noted above, immediately upon filing of its Chapter 11 proceeding on September 24, 1983 Continental unilaterally implemented new wage rates and work rules for each of its union groups, including the pilots. Continental undertook this action notwithstanding that the agreements with the pilots were not then open for negotiation and, further, the negotiating procedures of Section 6 of the Railway Labor Act had not been exhausted, as specified by the Act ("RLA").

The unions argue that notwithstanding § 365 of the Bankruptcy Code, the status quo provisions of the Railway Labor Act prohibit any unilateral change in the wage rates or work rules "on the property" until all negotiations pursuant to the scheme of the status have been exhausted. The Unions, including ALPA, argue that there is a difference between making unilateral changes in a contract which might be rejected the provisions of § 365 of the Bankruptcy Code and the statutory provisions of the RLA, which (they allege) continue the terms of the contracts in effect until the bargaining procedures have been completed. The Unions argue that § 365 does not authorize rejection of statutory requirements, as opposed to contractual provisions, i.e., this court cannot authorize changes in the wage rates and work rules of a carrier governed by the RLA until the Section 6 bargaining procedures have been exhausted. ALPA no doubt would concede that such procedure may take years (indeed it has already taken about nine months since filing without effect).

Unquestionably the Railway Labor Act contains "status quo" provisions. As noted by the 5th Circuit in the *United Industrial Workers of the Seafarers International Union of North America v. Board of Trustees of Galveston Wharfs*, 400 F.2d 320, page 329 "the objective of the Railway Labor Act is continuance of the status quo until the statutory procedures of the Act have been exhausted." And "As the Supreme Court stated in *Order of Railway Telegraphers v. Railway Express Agency*, 1943, 321 U.S. 342, 347, 64 S. Ct. 582, 586, 88 L. Ed. 788, 792, the failure of the carrier to proceed as provided by the Railway Labor Act of 1926, then applicable, leaves the collective agreement in force throughout." The court also noted with approval the language of *Order of Railway Conductors v. Pitney*, 1946 326 U.S. 561, to the effect that the object of Section 6 is to maintain the status quo pending the expiration of the period provided by the section for allowing the process of negotiation, mediation and conciliation to have a play. It is to prevent changes being made until these processes have been exhausted or the prescribed waiting period has expired without bringing them into effect. The 5th Circuit also noted that the Railway Labor Act is more concerned than the National Labor Relations Act ("NLRA") with continuance of the employers operations and the employer-employee relationship. This is evidenced by the fact that while bargaining is the first and last step under the NLRA it is only the first step under the Railway Labor Act in a ladder that leads to the White House if differences cannot be resolved.

Generally speaking, this principle is recognized by virtually all labor law precedents. On the other hand, while the Supreme Court in *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, ALF-CIO, et al v. Florida East Coast Railway Company*, 384 U.S. 238 (1965), recognized the requirement by law for the railway to abide by all the rates of pay, rules, and working conditions

specified in the existing collective bargaining agreements until the termination of the statutory mediation procedure, the court allowed exceptions "upon specific authorization of [the U.S. District] court after finding a reasonable necessity therefore". The Supreme Court therein recognized that one of the primary purposes of the Railway Labor Act is to keep the carrier operating. On page 246 the court notes "that the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute". In that nonbankruptcy case, the Supreme Court held that under emergency conditions the carrier would implement new terms and conditions governing the labor force as long as those changes were necessary for the railroad to fulfill its duty to continue operations, provided the power to make such changes is closely confined and is supervised. Thus, the Supreme Court has recognized that the status quo provisions of the Railway Labor Act must, in some instances, bend to the exigencies of the situation.

The evidence in the instant case shows that, had Continental not been able to significantly reduce its labor costs (by the unilateral implementation of less costly and more efficient work rules and pay rates) at the time it filed this proceeding, Continental would have run out of cash and would no longer be operating at the present time. It would have had to shut its doors even before this hearing commenced. Continental was simply in no position to continue its operations under the wage rates and working conditions contained in its agreements with the Airline Pilots Association. It did not have the money to do so nor the ability to acquire it. In addition, under the circumstances, Continental could not even have reduced its operations (as it did beginning September 27, 1983) and still have complied with the terms of its agreement with the ALPA. Continental reduced them

significantly, and it needed the low cost, the efficiency, and the flexibility of its emergency work rules in order to do so.

ALPA's contention cannot be sustained under the law. By virtue of § 1167 of the Bankruptcy Code (11 U.S.C. § 1167), the U.S. Congress provided that notwithstanding § 365 a debtor-in-possession under Chapter 11 of the Code cannot change the wages or working conditions of employees of a debtor subject to the Railway Labor Act except in accordance with Section 6 of such act. Changes in wages and working conditions would and are otherwise authorized by § 365 of the Bankruptcy Code. The Congress then expressly provided in § 103(g) of the Bankruptcy Code that Subchapter IV of Chapter 11 applies only to a case under such chapter concerning a railroad. *Section 1167 is part of Subchapter IV of Chapter 11.* Continental is not a railroad. Under the statutory scheme thusly set forth Congress, in its wisdom, by clear implication provided that a debtor governed by the Railway Labor Act need not comply with Section 6 of that act before making unilateral changes in wages and work rules if it is in Chapter 11 and is not a railroad. The statutory scheme of the Bankruptcy Code thereby provides for the action taken by Continental in this instance. It might well be noted that the Bankruptcy Code was enacted in 1978, the same year that airline deregulation became effective.

Further, since the contracts are no longer immediately enforceable after filing, the changes in wages and work rules are accomplished not by the employer's unilateral action, but rather by operation of law. *NLRB v. Bildisco & Bildisco*, supra, 104 S. Ct. 1188 at page 1200. In *Bildisco*, the Supreme Court laid down a pragmatic rule in dealing with the National Labor Relations Act. This court is persuaded that the reasoning of the Court in that case is likewise applicable here in relation to the RLA. As noted above, this debtor would not have survived implementation of the suggestion by the

Airline Pilots Association that Continental could make no post-filing change in its wage rates and working conditions.

In *Bildisco*, the Court held that the authority of a debtor-in-possession to seek rejection of the collective bargaining agreement was not qualified by the restrictions of Section 8(d) of the NLRA, which section established detailed guidelines for midterm modification of collective bargaining agreements. The Court noted the policies of flexibility and equity built into Chapter 11 of the Bankruptcy Code. These policies were desperately needed by Continental at filing in order to continue its duties as a carrier. As noted, performance of this duty to continue public service is one of the primary purposes of the RLA. At least to that extent, the Bankruptcy Code and the RLA are entirely consistent and compatible.

The Supreme Court did not fully accept the "new entity" theory utilized by the Court of Appeals in its *Bildisco* opinion, 682 F.2d 72 (3rd Cir. 1982), but the Court did observe that the debtor-in-possession, while the same "entity" which existed before the filing of the bankruptcy petition, is nevertheless empowered by the Bankruptcy Code to deal with its contracts and property in a manner that it could not have done absent the bankruptcy filing. The court noted that the fundamental purpose of reorganization is to prevent a debtor from going into liquidation with an attendant loss of jobs and possible misuse of economic resources. The court noted further that recapitalization of a debtor could be jeopardized if the debtor-in-possession was saddled automatically with the debtor's prior collective bargaining agreement. The Bankruptcy Code specifies that the rejection of an executory contract which has not been assumed constitutes a breach of the contract which relates back to the date immediately proceeding the filing of a petition in bankruptcy. 11 U.S.C. § 365(g)(1). The court further noted that if the debtor-in-possession elects to

continue to receive benefits from the other party to an executory contract pending a decision to reject or assume, the debtor-in-possession is obligated to pay for the "reasonable value" of those services, which, depending upon the circumstances of the contract may be what is specified in it. Should the debtor-in-possession elect to assume the executory contract, however, it assumes the contract cum onere.

The Supreme Court concluded that the filing of the petition in bankruptcy means that the collective bargaining agreement is no longer immediately enforceable and may never be enforceable again. Specifically the Court concluded that after the filing, the collective bargaining agreement is not an enforceable contract within the meaning of NLRA Section 8(d), and that it follows that the debtor-in-possession need not comply with the provisions of Section 8(d) prior to seeking the bankruptcy court's permission to reject the agreement. The court further stated that in a Chapter 11 case the "modification" in the agreement has been accomplished not by the employers unilateral action, but rather by operation of law. The court further noted that even the National Labor Relations Board had conceded in that case that the cumbersome and rigid procedures of Section 8(d) need not be imported into the bankruptcy proceedings. The Supreme Court also held that the debtor-in-possession need not bargain to impasse before seeking rejection and that these provisions of the National Labor Relations Act must be subordinated to the exigencies of bankruptcy.

In this court's opinion, the rationale of the Supreme Court in *Bildisco* is equally applicable to the Railway Labor Act and the status quo provisions of that act must give way to the realities of bankruptcy. A company whose financial life is threatened should not, under rational public policy be forced to adhere to principles which, though of good service in times

of ordinary financial health, would, as in this case, jeopardize the company's existence.

The unions' attempt to distinguish *Bildisco* because it dealt with the National Labor Relations Act, whereas Continental is subject to the Railway Labor Act. However, this court is not persuaded that in the situation that Continental now finds itself, there is any persuasive difference from the parameters outlined by the Supreme Court.

If ALPA's argument is followed, the statutory "status quo" provisions of the Railway Labor Act would put a financially troubled debtor to the task of an arduous (and perhaps impossible) process before it could obtain the economic relief which might well be necessary to its continued operation. The result in many instances, including this one, might well be that liquidation would result unnecessarily while lip service was being given to the alleged purposes of the Railway Labor Act, and many jobs would be unnecessarily lost. Clearly the overriding public policy is that more jobs should be saved under these unfortunate circumstances rather than that higher wages be paid for a short period of time before the debtor's financial heart stops beating. The demise of a company is too much of a price to pay for strict adherence to Section 6 bargaining requirements. Any policy which would tend to precipitate this demise could not truly be consistent with the spirit and purposes of the RLA, much less the Bankruptcy Code.

Once a company is legitimately in Chapter 11, as Continental has been found to be, the provisions of Title 11 and the principles of *Bildisco* are applicable to its collective bargaining agreements even though they are otherwise governed by the RLA. Unilateral changes may be made by the carrier at filing, at least where rejection of the agreement is later approved by the court. However, the debtor is still

required to make reasonable payment for the services it receives during the pendency of the proceeding and is obligated to bargain with the certified representatives of the employees both before and after rejection.

Continental was the first airline ever to attempt to fly through a Chapter 11 proceeding. Had Continental requested interim relief from the contract wage levels and work rules and had it been possible to have had such a hearing immediately, such relief would have been granted by this court; given the unusual circumstances concerning its cash position, the changes it made in its level of flying, its competitive situation, and the uncertainties that existed immediately after the filing of this petition.

The fact that other urgent matters were pending on this court's docket prevented it from hearing the evidence on the motion to reject for a few months. When the evidence did begin on January 30, 1984, it extended until April 28, 1984.

It appears to this court that to have required negotiations between the time of filing and the institution of emergency work rules unilaterally imposed by Continental Airlines on its pilots (when operations resumed three days after filing) would not only have required a useless and nonfruitful act (no agreement has been reached nine months later) but would have prevented Continental from resuming domestic operations at that time. Further since rejection is being allowed, had Continental not reduced its wage payments, it would have expended more monies in reliance on the contractual provisions than those necessary to obtain these same services. Continental would have paid more than the reasonable value of these services based on market rates, given all of the circumstances in this case.

Further delays in restricting Continental's flying operations would also have resulted in loss of those advantages it had as a going business. At worst, this could have resulted in the destruction of its business and at best it would have severely diminished its ability to reorganize. In either of these events, it would have stopped payment of wages to all employees for either a longer period or for all time.

RELATIVE EQUITIES

As has been noted, deregulation has caused some difficulty to the industry majors, including Continental. Other carriers have furloughed employees and many unions have granted concessions to various carriers in light of the increasing competition. Continental has suffered substantial losses since deregulation and now has a substantial debt structure and debt service. This debt service makes it difficult to compare Continental to other airlines in terms of what costs are necessary for it to be profitable.

An effort has been made to show that Continental was solvent when it filed its proceeding and that rejection should not be permitted. The effort to prove solvency stemmed from the appraisal of Continental's air fleet at an amount greater than that shown on its books. In other words, its airplanes have a greater market value than book value. It is axiomatic that for Continental to realize market value from these airplanes they would have to be sold. If they were sold Continental could not operate then. Without airplanes to operate, Continental would have additional obligations from rejections of its numerous leases on ground space and from other executory contracts. Whether the net result, taking all resulting liabilities into account, would show that Continental is solvent is speculative at this time. No effort was made to show this result. Resulting obligations from rejection of

executory contracts are not now on the books of Continental as a liability.

At filing, as determined in connection with the motion to dismiss, Continental had reached the point where it no longer had free assets upon which to obtain any credit and certainly could not obtain credit on the basis of its potential profit margin. Further, assuming Continental was in fact solvent, had Continental adhered to the labor costs specified in the respective collective bargaining agreements, Continental would have soon become insolvent unless it ran out of cash and had to close its doors before this occurred.

Moreover, if assets were liquidated (even at the best market price) there would be no further need for employees at Continental, including those who would seek to be employed under the collective bargaining agreement. Thus a sale of Continental's air fleet would defeat the purposes of such agreements entirely.

Therefore, it seems that for these purposes, a liquidation test for solvency seems foolhardy and a self-defeating way of evaluating Continental, under the circumstances. As a going concern, Continental was losing substantial sums of money. An evaluation of the assets on this basis (capitalized earnings) would not show Continental to be solvent. In addition, at the filing Continental was not paying its debts as they matured.

Unless a company can become profitable and maintain that posture consistently, it is inevitable that it go out of business. If a reorganization proceeding is to succeed, prior accrued indebtedness must be paid out of future profits (unless the company is liquidated). If there is no excess of money over and above operating expenses, there is nothing to pay prior indebtedness with; whether it be secured or

unsecured indebtedness, including any damages resulting from rejection of collective bargaining agreements.

The unions have recognized that Continental needs relief from the high labor cost which results from adherence to the respective collective bargaining agreements. Each has indicated in testimony before this court that it would (and/or did) agree to significant concessions in modification of these agreements. (Even the IAM's representative testified that it would - or might back off of its requested "industry standard" wages.)

The non-union employees agreed to their share of relief (by 80% vote). ALPA points out that Continental realized the savings it requested (pre-filing) from the IAM group as a result of the IAM strike and the interim work rules imposed on August 13, 1983 and by contracting out of much of the IAM employee work. The pilots intimate in testimony that they would have agreed to the \$60,000,000 requested of them and that Continental should have interpreted their "signals" to mean that they would agree to concessions at that level. The UFA has said it would agree to the \$40,000,000 in concessions requested by Continental pre-filing (and even more) but that the problem in reaching agreement has been the dispute over the value (UFA's costing) of the concessions offered by UFA. Continental says they are worth far less than the \$40,000,000 requested, while UFA says they were worth much more (i.e., \$50,000,000). However, the UFA never sent its costing experts to confer with Continental's - so the issue was never resolved. TWU did agree to the concessions requested by Continental pre-filing.

This evidence is indicative of the recognition by these unions that Continental cannot survive under the costs of these agreements as written.

When Continental resumed flying operations September 27, 1983 (after filing its Chapter 11 and being shut down for three days), it severely reduced its fare level on all flights in order to entice the flying public back onto the airline. It also needed to restore the confidence of travel agents who had been "booking away" from Continental as rumors of its financial troubles had grown (pre-filing). This had the desired effect. When it became apparent that the public perceived that Continental could fly through a Chapter 11, Continental increased its fare level but only to the point they were competitive with the low cost airlines flying in competition against them. However, unlike the low-cost competition, Continental still served hot meals on certain flights, and maintained free baggage handling and interchange with other airlines, a reservation service, and other amenities that are normally associated with a full-service airline. This has been criticized severely by the unions, but it has apparently been successful for Continental. Continental had tried maintaining higher fare levels and full service as a means of competing with the new entrants and had found it to be very unsuccessful.

Continental has implemented this marketing program and has set its fare levels in order to maximize its yield. It is not projecting a profit and has been meeting its projections for the first time in a long time. Taking into consideration all of the existing circumstances, this court concludes that Continental's business plan is reasonable.

The unions point out that the emergency work rules unilaterally imposed by Continental at filing would result in annualized cost savings to Continental far in excess of the \$150,000,000 requested just before filing. The unions contend that the annualized savings would be in the area of \$250,000,000. It should be noted that the \$150,000,000 in concessions was calculated merely for Continental to break

even. Further, at the time of the filing of its Chapter 11 proceeding, many uncertainties existed and many changes were taking place within the airline. Continental was cutting back its operations severely for a period of time. It did not intend to return fully to its pre-filing level of flying. It was and is facing increasing competition. There is potential for a fare war and skirmishes are even now being fought.

Continental needed the lower costs and flexibility provided by emergency work rules (or at least substantially so) in order to survive, right itself financially, and progress toward a stable and profit-making posture on a consistent basis. Substantial sacrifices have been, and are going to be, necessary for this airline to revitalize itself. The current working employees are making that sacrifice. They have recognized that meat and potatoes come first; dessert on the terrace comes later.

Because of the collective bargaining agreements the pilots have enjoyed standards of living that make the required sacrifices hard to adjust to. The court can understand why a pilot making at, near, or over \$100,000 per year has set a standard (or cost) of life style that makes adjusting to a salary of \$43,000 or less extremely difficult. Small wonder the pilots resist such a change. But economics can be harsh. It has been to the airline industry in general and to Continental in particular. The pilots have managed to negotiate (over the years) pay benefits and work rules which are onerous and non-productive, especially when compared to those of some of the other competitive carriers. The result was a significant cost imbalance and a substantial advantage to much of Continental's competition. In one sense, the pilots had simply priced themselves (and/or Continental) out of the existing market.

The average 1982 earnings for Continental captains (excluding TXI pilots) were \$89,673 the 94 DC-10 captains salary averaged \$101,793 in 1982. An analysis by the Economic Analysis and Information Services Department of ALPA concluded on July 28, 1983 that between 1980 and 1982 "pilots average earnings are greater than" the average earnings of accountants, attorneys, college professors, dentists and Ph.D. chemists and that only doctors earn more than pilots but that pilots salaries were increasing at a faster rate than those of any other profession.

Furthermore, the evidence showed that the actual hard-hour utilization of pilots was less than 60 per month, pre-petition. Scheduled flying days for pilots in May, 1983 (presented as an example) averaged 14 days for regular DC-10 and 727 pilots on domestic flights. In addition, pilots got substantial vacation time (between 16 and 44 days per year depending on seniority). This vacation time can, at least in part, be used to further reduce scheduled flying time.

Federal Aviation Regulations permit utilization of pilots up to 100 "block hours" in a calendar month, not to exceed 1,000 block hours per year.

It should be noted that traditionally Continental's labor force has historically been over 50% non-union, 6,776 out of 12,008 employees pre-petition and 3,553 out of 5,763 employees post-petition (56.4%) as of January 31, 1984.

As observed above, more than 50% of the currently active employees in each unionized job category^{6/} (and more

^{6/} At the time the IAM struck, 12:01 a.m. EDT, August 13, 1983, Continental sold all three of its flight kitchens (at Los Angeles, Denver and Houston) and contracted out this service and that of cabin cleaning and

(continued...)

than 80% of the active flight attendants) have elected to cross their own union's picket lines. This appears to be indicative of these employees' acceptance of the need of Continental for relief from the respective collective bargaining agreements and their willingness to work at the wage levels and under the working conditions (including increased productivity) being currently offered by Continental.

Continental is offering a living wage to its currently flying pilots. In addition, it is offering to its employees a profit-sharing plan guaranteeing each a participation in 25% of the profits of the airline from the first dollar upward. It has also proposed to this court for approval a stock ownership plan which would make the employees 35% owners of the company on a fully diluted basis. They as a group, would then be the largest shareholder of the company. Overall, morale appears to have increased post-filing to a very high level. As of April, 1984, Continental had grown to approximately 6,000 employees and was projecting 8,000 employees by the year end.

As of April 1, 1984, Continental had 1,070 active pilots, including those currently in training or on leave. Of this number, 494 were new hires and 576 were from its pre-petition seniority list. It employed 1,471 flight attendants, of which 270 were new hires and 1,201 were from its pre-petition seniority list. All of the ground instructors were still on the payroll as were 21 out of the 35 dispatchers (14 dispatchers were still on furlough).

^{6/} (...continued)
fueling because it could contract this service from third parties substantially cheaper than it could perform them with IAM employees under the terms of the IAM collective bargaining agreement.

Beginning in October, 1981, Continental management personnel endured a 10% pay cut and non-union employees had to forego scheduled pay increases. In January - February, 1982 personnel department positions were reduced by 35% and general staff levels in other offices were reduced 15%. In 1983, 25% of the remaining management staff jobs and 15% of the line management positions were eliminated. Non-unionized personnel and management were required to work extraordinarily long work hours and even split shifts in some instances. Just prior to the filing of bankruptcy, management employees had a 15% pay cut and reduction in benefits, and, as noted, non-unionized employees voted to accept similar reductions.

It is true that there were "snap back" provisions relating to these management pay cuts, and their salaries have been increased (snapped back) in part already. However, under the evidence, this court is convinced that Continental management employees are being paid materially less than competitive salaries for top management positions that other companies are paying for similar management skills. In addition, as noted, Continental management personnel have been required to work extraordinarily arduous schedules. Further reduction in their wages could result in loss of key employees, and it appears that Continental has in fact already suffered from this problem.

This court finds that non-union and management personnel have made sufficient sacrifices to justify rejection of the respective union contracts when balancing the rights between them. This is particularly true when you consider the high level of wages and salaries which had been bargained for by the various unions and agreed to by Continental, as set forth in these contracts.

Labor costs, were a major factor contributing to Continental's bankruptcy. If the contracts had not been rejected, the administration claims resulting from reinstating the contracts (and their resulting high cost) from the date of filing would in and of itself be highly damaging to the prospects of reorganization. Further, if the company is liquidated under Chapter 7, the contracts would be rejected as a matter of law, 11 U.S.C. § 365(d), and this rejection would likewise relate back to the date of filing.

Low labor cost are necessary for Continental at the present time and at least for the near term, foreseeable future, in order for Continental to be competitive.

Virtually no effort was made by ALPA to show that Continental could afford to pay materially more to its pilots than it is now doing under the emergency work rules. The only effort was a calculation to show that if Continental raised its fare levels without losing any of its passenger miles, it could do so. However, no evidence was introduced that convinces this court that if Continental materially raised its fares it would not lose a substantial portion of its flying customers.

There is little loyalty, if any, among passengers. Passenger miles are essentially fungible. Ticket prices remain the single most important element in attracting the flying public.

The court rejects the motion that Continental could materially raise its ticket prices and materially increase its pilots labor costs, unless, and until, its competition also raises ticket prices. That adventure has already been embarked upon by Continental in the past; all to its financial dismay.

It appears to this court that substantial jobs will be preserved as a result of rejection of these contracts. Certainly the creditors are likely to get more under any plan of arrangement than in liquidation; in fact, it is usually necessary for the court to find that they will receive not less than they would under Chapter 7 liquidation before any plan of arrangement can be confirmed. 11 U.S.C. § 1129(a)(7). Any such plan must be based on future earnings. From the evidence, it appears that there will be no earnings unless these contracts are rejected. Labor costs are such an important element in Continental's ability to operate profitably and to remain competitive that it cannot offer a plan or arrangement until it knows if the contracts are to be rejected, and, thereby, what its future labor costs are likely to be. The respective contracts must be rejected to get any new capital. No viable business plan can include a return to all of Continental's pre-petition labor costs.

Rejection will no doubt result in reduction in standards of living of many of the employees, and possibly even hardship in certain cases. Nevertheless, under the circumstances and the economics currently prevailing, there appears to be no reasonable alternative.

The unions argue that this court cannot make necessary determinations in order to allow rejection of the contract in light of the fact that Continental has not offered a plan of arrangement, because this court cannot assess the viability of such a plan or the need to reject the contracts as an integral part thereof. This court disagrees. The Supreme Court in *Bildisco* understood the difficulties in assessing the outcome of a potential reorganization in the beginning stages of such a proceeding. At this time the court cannot say that Continental will have a confirmed plan of reorganization, nor even that the confirmed plan will be successful, but it has determined that without rejection no viable plan providing for

future operation by Continental of its own air fleet is possible. The Supreme Court noted that "the Bankruptcy Court inquiry is of necessity speculative, and it must have great latitude to consider any type of evidence relevant to this issue." I believe that the findings of this court have satisfied this issue as required by *Bildisco* and other cases. In this instance, the inability of the parties to reach an agreement is in itself a deterrent to any plan of arrangement.

There was testimony that Continental could not afford any substantial increase in its current labor costs. A return to pre-petition labor costs under the ALPA contracts would preclude Continental from effective competition with the low cost, new entrants; some of which have negotiated contracts with the very unions which oppose Continental's motion to reject.

The unions argue that if the court allows rejection of the agreements, it should only allow rejection of those parts of the agreements that are burdensome and (presumably) should require affirmation of all other parts. This court has no true way to know the financial impact of each particular provision in the agreements. The Supreme Court in *Bildisco* noted that the bankruptcy court "need not determine that the parties have bargained to impose or make any other determination outside the field of its expertise." (Emphasis added).

The ALPA and UFA contracts are extremely complex. This court could not possibly rewrite them for the parties. If it tried to do so, in all likelihood serious mistakes would be made. As noted in the *Bildisco* opinion, the National Labor Policies generally require that employers and unions reach their own agreements on terms and conditions of employment free from governmental interference. The court cited *Howard Johnson Company v. Hotel Employees*, 417 U.S. 249 (1974); *NLRB v. Burns Security Services*, 406 U.S. 272, 282-294 (1974).

See also *Chicago and Northwestern Railway Company v. United Transportation Union*, 402 U.S. 570, page 579, footnote 11, referring to the strong federal labor policy against governmental interference with the substantive terms of collective bargaining agreements.

There is no provision in the Bankruptcy Code which would provide for rejection in part. Historical case authority indicates that executory contracts must be accepted cum onere or not at all. The Supreme Court in *Bildisco* did not provide for any such authority by this court; especially since the court noted that acceptance must be cum onere and cited *In re Italian Cook Oil Corp.*, 190 F.2d 994, 996 (CA 3 1951) for that proposition.

Continental has a continuing duty to bargain with the certified representatives of its employees in good faith. These parties are themselves in a better position to know the effect of the various provisions of their future agreements, which, by their nature, are extremely complex. Should this court impose restrictions or conditions on the rejection of these agreements, the court would not only be involved in an area outside of its expertise but it would violate strong principles of labor law that government not interfere in this bargaining process. This court should not impose on either party its own notions of what is fair or reasonable or economical under the circumstances. Neither the Bankruptcy Code provision (§ 365) nor applicable case law mandates that this court set any terms or conditions on the rejection and this court declines to do so in this instance.

The unions next argue that if the court is going to allow rejection of the agreements it should impose conditions on the rejection, such as requiring Continental to (1) reoffer its pre-petition concession package, (2) reimpose the "non-economic" provision of the agreements, and/or (3) implement those

provisions which have been "signed-off" on in the various labor negotiations. The unions cite *In re Parrot Packing Co., Inc.*, 99 C.C.H. Labor case P10, 550 (U.S.D.C. No. Dist. Indiana, Ft. Wayne Division, case number 83-10127) August 2, 1983, as precedent for this proposition.

The concessions that were requested pre-petition do not necessarily relate to the current labor cost requirements of Continental. The question of which provisions are in fact non-economic is in issue. Those "signed-off" provisions were not intended by the parties to be binding unless and until a complete and integrated collective bargaining agreement was reached; they were simply tentative and conditional. On the other hand, it is certainly fair for the unions to bring up these tentative agreements as well as the non-economic provisions in the future bargaining sessions that must take place.

If this court has the authority to impose such conditions it declines to do so in this instance.

The unions, including ALPA, have not seriously challenged with evidence that Continental is in serious financial condition or that it was losing money, nor that it needed serious economic concessions if it were to continue. Nevertheless, ALPA urges that the emergency work rules have inflamed the pilots.

The insult to the unions stems from the affrontery of the employer escaping from the "bonds" of their labor agreements before their very eyes; and in a highly visible way. However, this employer, while it appears to be the same, now has different characteristics and powers. Section 1107 of Title 11 proscribes that a debtor-in-possession has all of the rights, duties, and responsibilities of a trustee. Were there to be an "actual" trustee (i.e., a disinterested third person who could be perceived as acting on behalf of all interested parties) this pill

(having this modicum of sweetener) might not be so difficult to consume without even the benefit of liquid refreshment. Small wonder that frustration so conceived is the bearer of ill will and dismay.

Nevertheless, economics have changed substantially in the airline industry. Recognition must be given to this. The ALPA contracts give no such recognition nor any flexibility to deal with the existing circumstances. Under these circumstances, rejection of these burdensome agreements should be, and are, permitted under law.

To comply with the RLA, ALPA (as well as Continental) must continue to bargain. ALPA must lay aside other considerations and recognize that this is an economic problem. Economic problems are rarely, if ever, resolved in the courtroom. The striking ALPA pilots need the bargaining expertise of its union now more than ever. If properly and steadfastly exercised, the bargaining ability of ALPA can determine what level of pay and benefits Continental can afford to pay under existing economic circumstances. Whether, ALPA has alienated the working ALPA pilots to the extent that it has lost the leverage of support from this group remains to be seen. However, ALPA and Continental must bargain from the relative positions in which they now find themselves.

Signed this 17th day of August, 1984.

R.F. Wheless, Jr.
U.S. Bankruptcy Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2455

TEXAS AIR CORPORATION,
Plaintiff-Appellee,
and

CONTINENTAL AIR LINES, INC.,
Party In Interest-Appellee,

versus

AIR LINE PILOTS ASSOCIATION,
Defendant,
versus

JOSEPH E. O'NEILL, PHILLIP M.
ORDWAY, JAMES LOWRY, and
JACK PENDLETON, Etc.,

Intervenors-Appellants.

Appeal from the United States District Court for the
Southern District of Texas
(CA H 84 530)
(April 13, 1990)

Before BROWN, JOLLY, and DAVIS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:*

On August 18, 1982, Texas Air Corporation ("TAC"), the parent of Continental Air Lines ("Continental"), and the Air Line Pilots Association ("ALPA") executed a Letter of Agreement ("the Side Letter") in which TAC agreed "to provide reassurance that it is aware of and will abide by" the contemporaneously executed "Prosperity Plan" collective bargaining agreements between Continental and ALPA. Continental filed a Chapter 11 bankruptcy petition on September 24, 1983. On October 1, 1983, ALPA commenced a strike against Continental.

On January 31, 1984, TAC commenced this action seeking a declaratory judgment that the arbitration provision in the Side Letter could not be enforced because of Continental's bankruptcy. On January 23, 1985, the district court ruled that the dispute was covered by the Side Letter's arbitration clause, and it granted ALPA's motion to compel arbitration. TAC filed a timely motion to alter or amend the district court's order.

Following intensive settlement negotiations, on October 30, 1985, Continental and ALPA agreed to resolve ALPA's strike and to settle related litigation and bankruptcy claims. After resolving most of the issues through negotiations,

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the Court has determined that this opinion should not be published.

Continental and ALPA agreed to submit the remaining issues to Bankruptcy Judge Roberts, whom the parties designated by agreement to act as an interest arbitrator, in order to finalize the settlement. On October 31, 1985, Judge Roberts entered an Order and Award setting forth the terms of the settlement. The Order and Award ended ALPA's strike against Continental and contained back-to-work provisions. The Order and Award also required Continental and ALPA to dismiss strike-related litigation. An attachment to the Order and Award included the instant case as number five in a list of eighteen pending litigation matters to be "dismissed with prejudice," with the additional notation, "ALPA to withdraw with prejudice its request for arbitration and waive all claims arising under the TAC-ALPA Side Letter." The instant suit, however, remained pending despite the language of the Order and Award.

On February 18, 1986, while the TAC motion to alter or amend the district court's order compelling arbitration was still pending, the pilot-appellants in this case ("the O'Neill Group") moved as a class to intervene as of right in ALPA's claim against TAC pursuant to Fed.R.Civ.P. 24(a). The O'Neill Group pilots sought an order requiring TAC to arbitrate with them in ALPA's stead.

On July 28, 1987, the district court granted the pilots' motions to intervene and denied TAC's motion to alter or amend the order compelling arbitration.

On August 3, 1987, TAC filed a motion to vacate the order compelling arbitration. The O'Neill Group filed a cross-motion to enforce the order compelling arbitration. Although no motion to vacate the intervention order was pending before it, the district court vacated its previous order granting the pilots intervention of right, vacated the order compelling arbitration, and denied the O'Neill Group's motion to enforce

the order compelling arbitration. The district court held that the pilots were not entitled to intervene because individual pilots did not have rights to enforce the Side Letter and because the pilots were bound by ALPA's agreement to dismiss this case and "waive all claims arising under the TAC-ALPA Side Letter" in exchange for the benefits of the settlement for the striking pilots as a group. The O'Neill Group filed a timely notice of appeal.

An applicant is entitled to intervene as of right under Fed.R.Civ.P. 24(a) "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Review of a decision to deny a motion to intervene under Fed.R.Civ.P. 24(a) based on the applicant's interest in the subject matter presents a question of law subject to de novo review. *Mothersill D.I.S.C. Corp. v. Petroleos Mexicanos, S.A.*, 831 F.2d 59 (5th Cir. 1987).

We conclude that the district court correctly denied the O'Neill Group's motion to intervene, and we affirm the judgment of the district court for the following reasons:

1. The Side Letter is a contract between TAC and ALPA. The pilots were not parties to the Side Letter and were not granted any right to enforce its terms. Indeed, the Side Letter gives ALPA the exclusive authority to enforce its terms and to settle disputes arising under the Side Letter. "Where only the parties to the labor agreement are given the power to invoke the grievance machinery, an individual may not sue to compel arbitration." *Harris v. Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167, 170-71 n.4 (5th Cir. 1971). The O'Neill Group's reliance on cases that characterize

employees as third party beneficiaries of collective bargaining agreements is misplaced for two reasons: (1) the Side Letter is not a collective bargaining agreement; and (2) alternatively, none of those cases supports the proposition that an employee has standing to sue under a labor contract where the contract vests exclusive authority in the union to seek arbitration or where the union subsequently agrees to waive and settle all disputes under the contract.

2. In the Order and Award, ALPA expressly and unambiguously agreed to waive "all claims" arising under the Side Letter. The pilots argue, however, that the strike settlement preserved their individual claims because the settlement covered only those claims that ALPA had against Continental and TAC. We disagree. As of October 31, 1985, the date of the Order and Award, the O'Neill Group had not asserted or threatened any claims under the Side Letter and had not applied for leave to intervene in the lawsuit between TAC and ALPA with respect to the Side Letter. Nothing in the settlement or in the bankruptcy court and district court orders relating to the settlement preserves any individual claims by members of the O'Neill Group with respect to the Side Letter.

3. The pilots argue that ALPA had no authority to enter into a strike settlement that would extinguish their individual claims. We hold that ALPA had authority to bind the pilots to the settlement because the Side Letter itself gave ALPA exclusive authority to settle disputes arising thereunder and, alternatively, because the Side Letter dispute arose out of a classic "major" dispute. Furthermore, even if there were some doubt as to ALPA's legal authority, the pilots are estopped to deny that authority by their repeated acknowledgment of ALPA's status as their representative and by their failure to communicate the existence of limitations on

that authority or otherwise to repudiate ALPA's authority prior to ALPA's agreement to settle on their behalf.

"Major disputes" under the Railway Labor Act relate primarily to the formation of collective bargaining agreements; "minor disputes" involve the interpretation of collective bargaining agreements and the resolution of lesser disputes related to the employment relationship. *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 325 U.S. 711 (1945) (*Burley I*), *aff'd* on rehearing, 327 U.S. 661 (1946) (*Burley II*). Contracts that do not directly establish rates of pay may nonetheless deal with working conditions and be subject to federal labor laws. See *Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17, 26 (1962); *Morales v. Southern Pacific Transp. Co.*, 894 F.2d 743 (5th Cir. 1990) ("[s]tate law claims which grow out of the employment relationship can constitute 'minor disputes' under the Act, even when the claims do not arise directly from the collective bargaining agreement itself"). The collective bargaining representative has the exclusive right to bargain for and bind all employees in its jurisdiction where a "major dispute" is concerned. *Burley I*. With respect to a "minor dispute," however, settlement by the union "in the absence of legally sufficient authorization will not bar a suit by the individual employee to enforce his claim." *Broniman v. Great Atlantic & Pacific Tea Co.*, 353 F.2d 559, 562 (6th Cir. 1965), *cert. denied*, 384 U.S. 907 (1966).

The pilots contend that, "by analogy to" the Railway Labor Act, their claims under the Side Letter constitute a "minor dispute" because those claims involve the interpretation and enforcement of an existing agreement, the Side Letter, which by its own terms is not a collective bargaining agreement and has nothing to do with bargaining for the future. The pilots therefore contend that ALPA's settlement is not binding on them because ALPA did not have express or implied authority to settle the pilots' claims against TAC. We

disagree. The O'Neill Group's claims under the Side Letter arose out of Continental's rejection of its collective bargaining agreement with ALPA, which triggered ALPA's subsequent strike. The strike settlement that ended the strike and contained detailed back-to-work provisions clearly resolved a "major" dispute. In negotiating that settlement, ALPA had the authority to settle all claims arising out of that dispute, including claims, such as those under the Side Letter, that might in other circumstances be deemed "minor" disputes. *National Airlines, Inc. v. I.A.M.*, 478 F.2d 1062 (5th Cir. 1973); *United Indus. Workers v. Board of Trustees of Galveston Wharves*, 400 F.2d 320 (5th Cir. 1968), *cert. denied*, 395 U.S. 905 (1969).

TAC's motion to dismiss this appeal on the grounds of res judicata and mootness is denied. We also reject both parties' arguments regarding collateral estoppel, because we conclude that application of the doctrine of collateral estoppel is inappropriate in this case.

For the foregoing reasons, the judgment of the district court is

A F F I R M E D.

1. This Verified Counterclaim is brought for injunctive and declaratory relief and for damages suffered by Continental as the result of an unlawful scheme by ALPA to disrupt the business and operations of Continental by actions taken to undermine Continental's legitimate efforts to ensure

the pilot training and staffing necessary for the proper conduct of Continental's future flight operations.

2. This Verified Counterclaim alleges three causes of action arising under the following laws:

- a. The Railway Labor Act, Title 45, U.S. Code, § 151 et seq.;
- b. The common law of the State of Texas.

JURISDICTION AND VENUE

3. This Court has jurisdiction under Title 28, U.S. Code, § 1331, 1337, 2201, 2202; Title 29, U.S. Code § 185; and has pendent jurisdiction of Continental's Texas common law tort claim.

4. Personal jurisdiction and venue are based on Title 28 U.S. Code, § 1391, since ALPA is found within, has agents within, and transacts its affairs in the Southern District of Texas, Houston Division.

PARTIES

5. Continental is engaged in the business of providing air transportation service in interstate and foreign commerce pursuant to certificates of public convenience and necessity issued by the Civil Aeronautics Board under the Federal Aviation Act of 1958. Continental is a common carrier by air as defined in § 201 of the Railway Labor Act, 45 U.S.C. § 151 ("the Act"), and is subject to the provisions of the Act.

6. ALPA is an unincorporated association organized for the purposes and objectives of a labor organization, and

for other purposes, doing business in this judicial district. Prior to August 26, 1985, Continental had voluntarily recognized ALPA as the collective bargaining representative, as defined in the Act, for pilots employed by Continental. On August 26, 1985, Continental withdrew recognition of ALPA after receiving a petition signed by a majority of Continental's pilots which stated that the pilots no longer wished to be represented by ALPA.

FACTUAL BACKGROUND

A. Throughout Its Strike Against Continental, ALPA Has Resorted To Unlawful Conduct.

7. On September 24, 1983 Continental filed with the United States Bankruptcy Court for the Southern District of Texas petitions for relief under Chapter 11, Title 11 of the United States Code. Continental is continuing to operate its business as Debtor-in-Possession.

8. On October 1, 1983, ALPA went on strike against Continental. The strike has been a long and bitter one. Rather than bargain in good faith with Continental to resolve their disputes, ALPA has chosen instead to resort to economic coercion and, at times, to violent and unlawful conduct against Continental and its nonstriking pilot employees. In its Memorandum of Authorities Authorizing Rejection of ALPA's Collective Bargaining Agreements the Bankruptcy Court found:

[T]his court is concerned that the Airline Pilots Association does not intend to reach an agreement with Continental on terms the airline can afford. ALPA appears to have strong motives for seeing that the carrier is shut down as an example to the other carriers whose

pilots are represented by this large and extremely powerful union.

...

In the courtroom, ALPA has verified that its purpose is to shut down Continental. The Airline Pilots Association has made it clear, and has convinced this court, that its primary aim is to shut down Continental Airlines.

...

Thus ALPA's actions to shut down Continental and/or to deprive it of profitability reflects on ALPA's good faith in bargaining and on any equities involved.

9. Shortly after ALPA called its strike, ALPA induced a number of pilots to support the strike by means of misrepresentations as to the status of Continental's liability insurance. Such pilots had accepted flight duty and reported for their assigned flight, but upon hearing ALPA's misrepresentations "walked off" just before the time scheduled for take-off; at that late time it was extremely difficult, if not impossible, for Continental to find a replacement. This tactic led to lengthy flight delays, or to last minute cancellation of flights, when passengers were ready to board or had already boarded. It caused great inconvenience to the traveling public and damaged Continental's reputation. Continental secured a temporary restraining order against such misrepresentation on October 3, 1983 in the District Court, Harris County, Texas.

10. When ALPA's strike was called on October 1, 1983, approximately 190 Continental pilots immediately crossed the picket line to fly for Continental. Since that time, the number of pilots electing to cross ALPA's picket line has increased dramatically, to approximately 630. As the

Bankruptcy Court has found, Continental has honored pre-strike seniority of all pilots returning from the strike.

11. In October, 1983, ALPA, because of its concern about the number of pilots electing to go back to work, began an organized program involving the commission of criminal and violent acts against Continental's working employees designed to shut down the airline by intimidating pilots into joining ALPA's strike, and by otherwise victimizing and threatening Continental's employees. Scores of working pilots and their families were threatened with bodily harm and/or death if they did not stop flying and support ALPA's strike.

12. ALPA has also attempted to stop the working pilots from flying by subjecting the working pilots to hundred of incidents of vandalism to their homes and property and verbal and physical harassment. This pattern and practice of ALPA harassment has included: slashing and punching holes in automobile tires; splashing paint, paint remover and caustic substances on automobiles, homes, airplane hangars and equipment; painting and burning "scab" and other derogatory epithets onto lawns and property with caustic substances; inserting toxic and noxious odor-causing chemicals into homes and automobiles; cutting off working pilots' utilities without their consent; ordering magazine subscriptions and charging strike-supporting mailgrams to working pilots without their consent; mailing obscene letters and photographs to working pilots; and numerous other similar acts.

13. In further efforts to intimidate working pilots into joining the strike ALPA and certain ALPA members coordinated a series of arsons and bombings directed against working pilots. These criminal and life-threatening acts, and the subsequent knowledge of their occurrence among Continental's working pilot group, were intended to coerce and prevent pilots from crossing picket line and intimidate

working pilots into joining the strike thereby shutting down Continental's flight operations entirely.

14. ALPA's activities have also been focused directly at Continental's business operations. In December 1983, certain ALPA members met and planned the simultaneous contamination of Continental facilities in Denver and Houston with toxic chemicals for the purpose of causing major disruptions to Continental's flight operations during the Christmas holiday period.

15. As a result of illegal strike actions by ALPA members Continental was forced to seek and obtain Temporary Restraining Orders and/or Preliminary Injunctions to enjoin such conduct at airports serving Houston, San Antonio, Dallas-Ft. Worth, San Diego and Los Angeles.

16. At various times since the commencement of ALPA's strike, ALPA through its agent members has made and induced others to make phony reservations on Continental flights in an effort to injure Continental by causing substantial "no-showing" on Continental flights.

B. Continental's Withdrawal of Recognition of ALPA.

17. In August, 1985, Continental received a petition signed by over 1,400 Continental pilots stating that those pilots no longer wished to be represented by ALPA. The number of pilots signing the petition was in excess of a majority of all pilots employed by Continental, including both working and striking pilots, who would be considered eligible voters in any election conducted under the auspices of and in accordance with the rules of the National Mediation Board. To honor the wishes of its pilots, Continental withdrew its voluntary recognition of ALPA as representative of its pilots on August

26, 1985. See Exhibit 1 attached to this Verified Counterclaim.

18. ALPA continues to claim that it is the collective bargaining representative for Continental's pilots. ALPA has not followed the Railway Labor Act's statutory procedures for resolution of its representation dispute with Continental.

19. ALPA has chosen to resort to unlawful economic coercion and self-help to resolve its representation dispute with Continental. ALPA is attempting to disrupt Continental's future flight operations by sabotaging the "System Bid" process utilized by Continental to fill vacant pilot positions and to ensure the training and staffing necessary for the proper conduct of Continental's future flight operations.

C. The System Bid Process

20. Continental's pilot employees have historically determined their assignment to vacant positions through a process known as the "System Bid" process. Continental's pilot positions are classified by rank or "status," (i.e. Captain, First Officer, Second Officer) "domicile (base city)" and "equipment type." Each new vacancy (and any secondary vacancies) are awarded by status, city and equipment type according to pilot seniority within Continental. Each bid submitted specifies a pilot's preferred positions (in descending order of preference) by status, city and equipment type.

21. Continental's System Bid process is extremely complicated due primarily to two factors: (1) the multiplicity of factors affecting a bid; and (2) the training which is required once pilots are awarded new positions. The rank of Captain is the most senior position and pays the highest salary; the rank of First Officer (co-pilot) is generally regarded as the next most desirable position; the rank of Second Officer

(Flight Engineer) is generally regarded as the least desirable and most junior position. Each of these three positions have different job duties, qualifications and training requirements pursuant to FAA regulations. Pilots are or will be based in one of five domicile locations -- Denver, Colorado, Houston, Texas, Los Angeles, California, Honolulu, Hawaii and Guam. Continental currently uses five types of equipment -- DC-9's, DC-10's, MD-80's, Boeing 727's and Boeing 737's. The DC-10 and 727 equipment require the assignment of three pilots per aircraft crew; the other equipment does not require a Second Officer-Flight Engineer and is staffed by a two-pilot crew. To expand its fleet in 1986, Continental plans to add additional Boeing-737's and other aircraft types, such as either Boeing-757 and/or the Airbus A-300.

22. Since a system bid is the means by which Continental plans its pilot training and staffing needs and by which pilots are promoted or change positions, it is essential for Continental and its pilot employees that the bidding process be conducted properly. Accordingly, Continental has established specific bidding procedures which are well known to Continental's pilots and to ALPA. A pilot who intends to bid for a vacant position must normally submit his bid in person on the official company bid form, which is in triplicate. A copy of Continental's official bid form is attached to this Verified Counterclaim as Exhibit 2. For a bid to be valid, the form must normally be submitted in person and signed "received" by a member of Continental's management.

23. Once pilots have submitted their bid forms to Continental, the sole determinant of what vacant position they will receive is their seniority level. Each type of aircraft possesses different instrumentation and operating characteristics; the Federal Aviation Regulations established by the Federal Aviation Administration require specific training and qualification for pilots assigned to each position on each

type of aircraft. See 14 C.F.R. Part 141. Pilots who are qualified to fly one position or one type of aircraft are not necessarily qualified to operate another type of aircraft or a different position on the same type of aircraft. Therefore, a pilot may bid for and, through seniority, be awarded a position on a type of aircraft which he is not qualified to fly. Such a pilot would be required to undergo extensive training before he is qualified to fly the aircraft in his new position. The dimensions of this training program are dramatically extended by two factors: (1) the need to continue and staff ongoing flight schedules while a significant number of pilots are removed from such schedules to undergo training, and (2) the "ripple effect" of contingent vacancies created when incumbent pilots are promoted to new positions, thereby opening their current positions as secondary vacancies available to less senior pilots.

24. The training system which Continental has established to qualify its pilots to operate the various kinds of equipment in its fleet is extremely costly and time-consuming. Depending upon prior training and experience, pilots attend training sessions full time for a number of weeks or even months. They receive in excess of 120 hours of classroom instruction and flight simulation.

25. Continental has established extensive procedures to ensure that such retraining is accomplished in a timely manner so that Continental has a sufficient number of trained pilots to staff new vacancies for each equipment type at each base and to operate its fleet on schedule. Continental trains its pilots, subject to availability of training facilities, in all equipment statuses simultaneously. Junior pilots (or new hires if necessary) will fill the entry level second officer positions.

26. In order for this System Bid staffing and training process to proceed, however, it is imperative that the System

Bid be reliable, i.e., that each pilot bidder will appear for training and flight duty as scheduled. Should a pilot fail to appear, the next most junior bidder is unlikely to be available as an immediate replacement because that more junior pilot will have already been retrained for another newly awarded bid position. Even if the next junior pilot were available for retraining, however, he could not be removed from his then current position without creating a secondary vacancy and an attendant "ripple effect" throughout the seniority list. When that ripple effect played out, Continental would have suffered a multitude of needless retraining requirements, with attendant delays in producing trained pilots when needed, and would still end up short staffed for new equipment and thus unable to operate the aircraft as planned. For each pilot who completes training but fails to appear for flight duty Continental will be required to train up to eight additional pilots, at a total cost of approximately ninety thousand dollars.

D. The Current System Bid

27. On September 9, 1985, Continental posted "Supplementary Base Vacancy Bid 1985-5" (Exhibit 3 to this Counterclaim). This bid announced 380 new Captain and First Officer positions which will be available in 1986 due to the continued expansion of Continental's aircraft fleet and flight schedules. The bid required all participating pilots to submit their bids by 12 noon CDT on September 18, 1985. Continental expects that the entire training process which will follow this system bid will require the training or retraining of approximately 1,200 pilots and to last eleven months; Continental estimates that this training will cost approximately 10-12 million dollars.

28. The scheduling of Continental's training procedures has required elaborate advance planning, which necessarily took into account such complex factors as the

availability of personnel, availability of facilities, maintenance of the airline's planned flight schedule and availability of equipment. The purpose of this process is two fold: (1) to insure that Continental is able to operate its flight schedule with no disruption in service, inconvenience to the traveling public or loss of revenue during the training period; and (2) to provide Continental with qualified pilots to fly its equipment on schedule at the end of such training period.

29. The comprehensive system which Continental has developed to fill the new jobs is premised on the basic assumption that those pilots who submit bids and are awarded new positions will report for training as scheduled and will report to work in their new assignments once their training is completed. If more than a handful of pilots who bid for and receive new positions do not report to training or work once their training schedule is completed, then it will be impossible for Continental to operate all of its scheduled flights. Such a disruption in Continental's service would have a devastating and long term impact on the airline. Moreover, it would adversely affect the positions of Continental's other pilots participating in the System Bid.

E. ALPA's Scheme To Harm Continental's Operations and Its Nonstriking Employees By Sabotaging Continental's System Bid.

30. On September 15, 1985, almost two full years after beginning its strike and soon after Continental withdrew its voluntary recognition of ALPA, ALPA suddenly told its striking members to (1) submit form letters stating an "unconditional offer" to return to work and (2) to participate in the current System Bid using a form which did not comply with Continental's established procedures. See Letter from Dennis Higgins, ALPA Continental MEC Chairman to all

Continental Striking Pilots, attached to this Verified Counterclaim as Exhibit 4.

31. In public statements, ALPA has made it clear that it is not calling off the strike but is simply changing tactics. Captain Henry Duffy, President of ALPA, is reported to have said that "for strategic and humanitarian reasons, our best action would be to allow striking pilots to try to get back on the property if they are so inclined." (Emphasis supplied). ALPA has also pointedly stated that "there is something to be said for having your people back on the property." See ALPA Press Release attached to this Verified Counterclaim as Exhibit 5.

32. Many of ALPA's striking pilots (all of whom have continued to accrue seniority during the strike) have attained levels of seniority which would make them eligible to win their bids for Captain positions on new equipment which require the most extensive training.

33. ALPA has instructed and directed its striking members to submit "unconditional offers" to return to work and submit bids whether they intend to return to work or not. By this action, ALPA has demonstrated its malicious and unlawful intent to undermine and sabotage the system bid process and to disrupt Continental's proper efforts to ensure the pilot training and staffing necessary for the proper conduct of Continental's flight operations. ALPA's apparent objective is to disrupt Continental's flight operations and to deprive Continental's working pilots of opportunities to advance within Continental.

34. The leadership of ALPA is composed of veteran pilots who are aware of the importance of Continental's bidding process to its schedule operations. They know that if any significant number of pilots fail to report for training or

flight duty as scheduled, the consequence would be to cripple Continental's ability to implement the airline's planned flight schedule and to cause serious and irreparable harm to Continental. ALPA has ordered its striking members to submit bids to Continental even though they do not intend to return to work with the malicious and unlawful intent to interfere with Continental's operation of its business and its ability to operate in interstate commerce.

35. As of September 18, 1985, the date on which the bidding closed, over 500 striking pilots submitted bids to Continental. Many of the bids submitted by striking pilots did not comply with Continental's established bid procedures. As a result of ALPA's actions and statements, Continental does not know how many, if any, of these striking pilots intend to return to work. ALPA's conduct has tainted the validity of the offers to return to work and system bids of all striking pilots.

FIRST CAUSE OF ACTION

36. Continental repeats and realleges the allegations in Paragraphs 1 through 35 as if fully state herein.

37. By its aforesaid conduct, ALPA is unlawfully engaging in economic coercion and self-help to resolve its dispute with Continental over representation. Such conduct violates Section 2, First and Ninth of the Act, 45 U.S.C. § 152, First and Ninth. In the event that ALPA's claims of continuing representative status are correct, the aforesaid acts of ALPA also violate ALPA's duty to bargain in good faith and to "exert every reasonable effort to . . . avoid any interruption to commerce or to the operation of any carrier . . ." contained in § 2, First and Second of the Railway Labor Act, 45 U.S.C. § 152, First and Second. The Norris-LaGuardia Act, 27 U.S.C. § 101 et seq., governing injunction

of peaceful labor disputes has no application because the actions to be enjoined are in violation of the Railway Labor Act. *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad*, 353 U.S. 30 (1957).

38. Unless enjoined by the Court, ALPA will continue its illegal activities in violation of the Act.

39. Continental has no adequate remedy at law. ALPA's course of conduct has caused an unless enjoined will continue to cause substantial irreparable injury to Continental.

SECOND CAUSE OF ACTION

40. Continental repeats and realleges Paragraphs 1 through 35 as if fully stated herein.

41. ALPA's tampering with the bid process violates the valuable right active pilots otherwise would enjoy to bid for and assume preferred positions. This conduct maliciously interferes with the active pilots' business relationship with Continental and the right of active pilots to be free of coercion under Section 2 of the Act, 45 U.S.C. § 152.

THIRD CAUSE OF ACTION

42. Continental repeats and realleges Paragraphs 1 through 35 as if fully stated herein.

43. The acts described in Paragraphs 30 through 35 above were committed by ALPA with malice and for no lawful purpose.

44. The acts described in Paragraphs 30 through 35 above interfered with Continental's business relations with its employees and customers.

45. In committing the acts described in Paragraphs 30 through 35 above, ALPA had no just cause or excuse for interfering with Continental's business relations with its employees and customers.

47. The acts of ALPA described in Paragraphs 30 through 35 have caused and, if not enjoined, will continue to cause actual damage to Continental in an amount in excess of 10 million dollars.

PRAYER FOR RELIEF

WHEREFORE, Continental prays that the Court:

1. Issue a preliminary injunction, the same to be made permanent on final hearing, directing and requiring ALPA, its officers, agents, employees, and members and all persons acting in concert or participation with them to cease and desist from conducting, continuing in or engaging in efforts to interfere with Continental's system bid in any way; to cease and desist from instructing nonstriking pilots to submit bids whether or not they intend to return to work; and to cease and desist from interfering in any way with Continental's normal operations;

2. Direct ALPA to issue such notice and instructions and take all other necessary steps, including intra-union discipline, to carry into effect the order of this court;

3. Declare the rights of the parties;

4. Award Continental damages against ALPA for losses and injuries resulting from ALPA's unlawful acts;

5. Award Continental its attorneys' fees and costs in this action together with all other relief that the Court deems just and proper.

Respectfully submitted,
AKIN, GUMP, STRAUSS, HAUER & FELD

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